77-1670

No. 77 -

IN THE

Supreme Court of the United States

October Term, 1977

SUFFOLK OUTDOOR ADVERTISING COMPANY,
Appellant,

v.

THEODORE O. HULSE, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

WILLIAM H. ALLEN
MICHAEL A. SCHLANGER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CARL W. PETERSON, JR.
Hancock, Estabrook, Ryan,
Shove & Hust
One Mony Plaza
Syracuse, New York 13202

Attorneys for Appellant

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Court of Appeals of the State of New York sustaining the validity of a town ordinance against a challenge to its constitutionality as applied to the property involved in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 43 N.Y.2d 483, 402 N.Y.S.2d 368 and 373 N.E.2d 263, and is set forth in Appendix A hereto (pp. 1a-7a). The opinion of the New York Supreme Court, Appellate Division, Second Department, is reported at 56 App. Div.2d 365 and 393 N.Y.S.2d 416, and is set forth in Appendix B hereto (pp. 8a-41a). The decisions

and orders of the New York Supreme Court, Special Term, Suffolk County, are not officially reported. They are set forth in Appendix C hereto (pp. 42a-53a).

JURISDICTION

Appellant Suffolk Outdoor Advertising Company instituted this action as a suit for declaratory and equitable relief and money damages in the courts of New York. The suit challenged an ordinance of the Town of Southampton that prohibits the maintenance of standard off-premises outdoor advertising signs throughout the Town. Among the grounds asserted for a judicial order was that on its face the ordinance, insofar as it prohibited the maintenance of Suffolk's billboards in Southampton, abridged freedom of speech in violation of the First Amendment and deprived Suffolk of property without due process of law in violation of the Fourteenth Amendment. (A-111-12.)[1] By orders of March 30 and April 19, 1976, a motion to dismiss those two and other claims was denied at Special Term. The Appellate Division modified those orders by directing the dismissal of those two claims, and the Court of Appeals modified and affirmed the order of the Appellate Division.

The Court of Appeals' final judgment was entered on December 21, 1977, and is set forth in Appendix D hereto (pp. 54a-55a). An order of the Court of Appeals denying Suffolk's motion for reargument and for an amendment of the remittitur was entered on February 22, 1978, and is set forth in Appendix E hereto (p. 56a). Notices of appeal were filed in the Court of Appeals and at Special Term on May

[1]References to the Appendix below are cited "A-____."

11, 1978, and are set forth in Appendix F hereto (pp. 57a-60a).

Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court: *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Cohen* v. *California*, 403 U.S. 15 (1971); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

STATUTE INVOLVED

Building Zone Ordinance No. 26 of the Town of Southampton sets forth restrictions on the erection and maintenance of "billboards"[2] within Southampton. The provisions of the ordinance challenged on this appeal are sections 3-50-60.07 and 3-110-70.03, which provide, in relevant part, as follows:

> "3-50-60.07 — Billboards are prohibited in all Districts, except that the Town may establish special public information centers wherein approved directional signs for businesses may be located."

> "3-110-70.03 — Anything to the contrary in this Ordinance notwithstanding, any nonconforming billboard . . . shall become an unlawful structure on June 1, 1975, and shall thereupon be removed."

[2]Under § 1-30-20.68 and 1-30-20.69, a "billboard" is a "sign" that directs attention to a business or goods or services sold or offered "elsewhere than upon the same lot" where the sign is located. Many forms of accessory or on-premises signs are permitted under § 3-50 *et seq.* of the ordinance. On-premises signs would include signs in the parking lot adjoining a liquor store or a franchised fastfood carryout and signs on the wall of a building housing a hardware store or laundromat.

Other pertinent provisions of the ordinance are set forth in Appendix G hereto (pp. 61a-72a).

QUESTIONS PRESENTED

1. Whether a municipal ordinance that expels from a 171-square mile municipality of 44,000 inhabitants an entire medium of mass communication, where the sole justification for the expulsion is a perception that the medium offends undefined "aesthetic" values, constitutes an impermissible abridgment of freedom of speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment.

2. Whether a municipal ordinance that effects a total destruction of a decades-old legitimate business by requiring that business to remove its property from the municipality, without compensation, where concededly the continuance of that business will not adversely affect the health, safety or tangible welfare of other persons or their property, deprives the proprietor of property without due process of law in violation of the Fourteenth Amendment.

STATEMENT

The subject of this case is the constitutionality of an ordinance of the Town of Southampton that requires the removal from Southampton of 36 off-premises outdoor advertising signs maintained by appellant Suffolk Outdoor Advertising Company in various of the town's 17 types of zoning districts that are occupied also by other commercial establishments.[3]

[3]A-36-37; Building Zone Map for the Town of Southampton (May 22, 1972); Building Zone Ordinance No. 26 of the Town of Southampton at 53-60 (May 2, 1972). Since the date of the final judgment of the court below, the State of New York paid compensation to Suffolk Outdoor for the right to remove eight of the signs. The remaining 26 signs are still standing.

Suffolk has been engaged in the business of erecting and maintaining such signs — commonly known as billboards — since 1965, when it purchased the existing Southampton plants of Peconic Outdoor Advertising Company and Foster and Kleiser, one of the largest outdoor advertising companies in the country. (A-127.) Signs now owned by Suffolk have been part of the Southampton landscape since 1934, and all of the locations on which Suffolk's Southampton signs now rest were first occupied before 1965. (A-127-28.)

Southampton's location, size and long-standing self-definition, as expressed in its Building Zone Map and its Master Plan[4] explain why legitimate advertising businesses, such as Suffolk (and Peconic and Foster and Kleiser before it) took root and flourished in its business districts. With an estimated year-round population of 44,376 in 1976,[5] and an area of 171 square miles (more than 16 percent of Suffolk County),[6] Southampton, while a town in name, is more than seven times the size of Manhattan[7] and is more populous than hundreds of the cities of New York State and all but nine of the communities of the Long Island counties of Suffolk and Nassau.[8]

[4]Town of Southampton, Master Plan Report (1970).

[5]Population Survey, 1975 Current Population Estimates for Nassau and Suffolk Counties 40 (Long Island Lighting Co., 1975).

[6]County Catalog, The Suffolk County Planning Dep't 28 (1975).

[7]County and City Data Book 330 (1972).

[8]U.S. Bureau of the Census, Dep't of Commerce, Series P-25, No. 680, Current Population Reports 19-20, 27-28 (May 1977).

The Town's planners have foreseen and welcomed substantial population growth. Thus, the Southampton 1970 Master Plan noted the status of Suffolk County as the fastest growing county in the United States between 1950 and 1960[9] and predicted that Southampton, in the eastern center of the County, was "in the path of the development tide from the west."[10] This forecast appeared to the Town's planners consistent with the Nassau-Suffolk Regional Planning Board's projections that by 1990 Southampton's year-round and "seasonal" (summer and weekend) populations would reach 84,000 and 175,100, respectively.[11]

Southampton's zoning ordinance also is designed to foster commercial activity, providing as it does six types of districts zoned for business and one type for industry. Of Southampton's 89,570 land acres, 2300 are zoned "commercial" and 800 are zoned "industrial,"[12] and the Town's 1970 Master Plan proposed an expansion of industrial acreage to 6600.[13] Among its resident businesses are sand and gravel mining operations, asphalt and fertilizer plants, the Bridgehampton Racetrack (an automobile racetrack) and private dumps and automobile graveyards. While Southampton has prepared for rapid growth, Suffolk Outdoor, the only standardized billboard operator in the Town, has remained stable in size and discriminating in its choice of locations. Each of its signs is located on or adjacent to a major commercial thoroughfare linking Southampton with

[9]Master Plan at 19. Its 1976 estimated population was 1,297,256, a 95% increase from 1960; it is projected that its population in the year 2000 will be 2,379,000. Suffolk, The County Bountiful 7 (Suffolk County Dep't of Commerce & Indus., 1976).

[10]Master Plan, "Preface."

[11]*Id.* at 20. Southampton's seasonal population in 1968 was estimated at 98,100. *Id.*

[12]Surveys and Analyses Report, Part 1, Southampton Community, Table 13 (1970).

[13]Master Plan at 47.

other area communities, and 12 of its signs are on or visible from Routes 27 or 27A, the major east-west arterials spanning the 123-mile length of Long Island and connecting New York City with Montauk Point.[14]

The spaces on Suffolk's signboards are purchased by national and local commercial establishments, agencies of the United States government, candidates for public office, and citizens' groups seeking to present their positions on controversial issues of public importance.[15] At any one time at least 3 to 5 percent of Suffolk's signs are donated by it for the presentation of public service advertising on behalf of local charities and other causes.[16]

Those desiring to communicate through Suffolk's Southampton signboards can and do expect that their messages will effectively be transmitted far beyond Southampton's borders. As with the other mass media, the value of outdoor advertising is measured by its circulation, which is defined by the industry as the number of persons passing a sign each day.[17] Because of the heavy flow of daily commuter traffic along Route 27 and the other thoroughfares served by its Southampton signs, the average daily circulation of Suffolk's Southampton signs is approximately 8440.

All of Suffolk's signs have been operated lawfully on property leased from Southampton land owners; when the litigation began, the estimated fair market value of Suf-

[14]A-36-37; Hagstrom Suffolk County Atlas 64-65 (1976).

[15]A-109-10.

[16]It is common practice for member companies of the outdoor advertising industry to donate substantial amounts of sign space for public service advertising. See discussion *infra* at 22 n.34.

[17]A-109-10.

folk's Southampton plant was $185,000. (A-107.) On May 2, 1972, the Town of Southampton adopted Building Zone Ordinance No. 26, which became effective upon publication. § 7-70-10. Section 3-50-60.07 prohibited the erection of billboards throughout Southampton, and Section 3-110-70.03 required that all billboards then standing within the Town be removed by June 1, 1975. (A-165-66.) Section 3-110-70.04 permitted a billboard owner to seek and obtain an extension of the June 1, 1975, removal date for a particular sign, if the owner could establish its inability to effect the "amortization" of that sign's "construction cost" by that date. (A-166.)

On May 22, 1975, Suffolk filed the present action in the New York Supreme Court, Special Term, Suffolk County. (A-31-37.) On September 3, 1975, Suffolk filed an amended verified complaint. (A-107-17.) That complaint included allegations that the ordinance was unconstitutional on its face, in that it abridged the free speech rights of Suffolk and of those with whom it sought to communicate in violation of the First Amendment (A-111-12) and deprived Suffolk of its property without due process of law in violation of the Fourteenth Amendment. The Town moved to dismiss the complaint for failure to state a claim. (A-60-61.)

The Special Term of the New York Supreme Court denied the Town's motion to dismiss the free speech and due process counts of the amended complaint. The Appellate Division reversed.

The New York Court of Appeals basically affirmed the decision of the Appellate Division, specifically upholding the constitutionality of the ordinance and rejecting Suffolk's First and Fourteenth Amendment contentions. (App. A, pp. 1a-5a.) So far as the three-year so-called amortization period is concerned, the court remitted Suffolk to its opportunity under the ordinance to attempt to persuade

the Town authorities that the period is "unreasonable." In doing so, it made clear its standard of reasonableness is less demanding than that of constitutionally-required just compensation. Thus the court rendered a final judgment dismissing Suffolk's complaint and declaring that a local government in the exercise of its police powers, without invoking the power of eminent domain, may eliminate billboards consistently with the First and Fourteenth Amendments.

The court appeared first to accept the basic "commercial speech" holding of the only one of this Court's decisions cited by it, *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976), but held billboards beyond its coverage because "the court recognized that a State may regulate the time, place or manner of commercial speech . . . to effectuate a significant governmental interest" and that the "regulation of aesthetics constitutes such an interest." (App. A, p.2a). As the dissenting judge of the Court of Appeals stressed, what was permitted by the majority opinion as a mere "time, place, and manner" restriction "constitutes an outright ban on a significant form of communication." (App. A, p. 6a.)

On the Fourteenth Amendment question, the Court of Appeals proceeded on the assumption that the ordinance was enacted solely to promote aesthetic interests. It held forthrightly that "aesthetics constitutes a valid basis for the exercise of the police power and that the Southampton ordinance prohibiting non-accessory billboards is substantially related to the effectuation of this objective." (App. A, p. 4a.) In so holding, it did not cite a single decision of this Court. Instead, it placed total reliance on several of its own decisions, none of which had upheld the uncompensated removal of off-premises outdoor advertising structures in place at the time of the enactment. Unassisted, then, by any judicial authorities, even its own, the Court of Appeals concluded that the prohibition was

not "oppressive," because it permitted some local businesses to maintain certain on-premises signs, "thus providing an operative means of advertising." *Id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. A MUNICIPAL ORDINANCE THAT EXPELS FROM A TOWN AN ENTIRE MEDIUM OF MASS COMMUNICATION, WHERE THE SOLE JUSTIFICATION FOR THE EXPULSION IS A PERCEPTION THAT THE MEDIUM OFFENDS UNDEFINED "AESTHETIC" VALUES, CONSTITUTES AN IMPERMISSIBLE ABRIDGMENT OF FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT

The court below held that in the pursuit of "aesthetics" alone a town may expel from its midst an entire medium of mass communication without abridging First Amendment rights. The court reached this conclusion by labeling Suffolk's messages "commercial speech," the "time, place or manner" of which could be "regulated" through a town-wide prohibition to effectuate the "significant governmental interest in aesthetics."

It cannot conscientiously be maintained that the constitutional question that the Court of Appeals undertook thus to answer is not substantial; the answer that the Court of Appeals gave to the question is not compelled by any decision or line of decisions of this Court and, we submit, is inconsistent with this Court's controlling First Amendment precedents. The least that can be said is that this Court has not specifically considered the question. This Court has never considered the exclusion from an entire community of outdoor advertising as a medium of communication. The Court has not considered any sort of billboard restriction or

prohibition as against a First Amendment challenge except in one summary disposition matter, now seemingly outdated, in which the only First Amendment authority for the judgment of the state court sustaining the restriction was *Valentine v. Chrestensen*, 316 U.S. 52 (1942). *Markham Adv. Co. v. Washington*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).[18] It has certainly not decided that a community-wide prohibition of billboards in the interest of aesthetics is among the time, place or manner restrictions on commercial speech that the Court in its opinions repudiating what had been taken to be the rule of *Valentine v. Chrestensen* has indicated may be permissible. *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

If the issue of First Amendment protection of outdoor advertising is thus open in this Court in the sense that the Court has not ruled specifically on billboards since the constitutional protection of commercial speech became clear, we submit that under this Court's relevant precedents the Town of Southampton's effort to eliminate Suffolk Outdoor's signs from the Town is invalid.

The error of the Court of Appeals in reaching the contrary result is the error that this Court pointed out in the opinion that started it on the road toward recognition that commercial speech, so called, merits constitutional protection. In *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), the Court admonished that a court may not by the application of labels "escape the task of assessing the First Amendment interest at stake and evaluating it against the public interest allegedly served by the regulation."

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[18] See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94 n.7 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50, 68 n.30 (1976) (Opinion of Stevens, J., concurred in by Burger, C.J. and White and Rehnquist, JJ.)

The court below neither identified that task nor acknowledged that the requisite process of assessment and evaluation began rather than ended with the characterization of a restriction on speech or press as one of "time, place or manner," rather than "content." Like any other catch-phrase, "time, place or manner" carries the risk that eventuated in the court below of being made to substitute for analysis. Place and manner restrictions on speech are by no means automatically valid. In *Schneider v. State*, 308 U.S. 147, 163 (1939), the Court said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975). And numerous decisions attest to the truth of the understatement in *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 757 (1976), that "we are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . ." A speaker has the constitutional right to utilize effective means of communication of his choice, *e.g.*, to make speeches,[19] to distribute leaflets,[20] to canvass door-to-door,[21] to picket,[22] to march,[23] to wear armbands.[24]

In *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), the Court stated the

[19] Kunz v. New York, 340 U.S. 290 (1951).

[20] Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); Talley v. California, 362 U.S. 60 (1960).

[21] Martin v. City of Struthers, 319 U.S. 141 (1943).

[22] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[23] Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

[24] Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969).

stringent standards against which a purported time, place or manner restriction is to be tested.

> "We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."

We take up the standards and the extent of their satisfaction in this case in the reverse of the order of their statement by the Court.

1. **Alternative Channels.** In *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court, dealing with a town ordinance that prohibited the posting of real estate "For Sale" and "Sold" signs, found that "serious questions . . . exist as to whether the ordinance 'leave[s] open ample alternative channels for communication'" and made clear that this standard is not easy to satisfy.

> "Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated — primarily newspaper advertising and listing with real estate agents — involve more cost and less autonomy than 'For Sale' signs; cf. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943); *Kovacs v. Cooper*, *supra*, at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States v. O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, cf.

Cohen v. California, 403 U.S. 15, 25-26 (1971). The alternatives, then, are far from satisfactory." 431 U.S. at 93.

The opinion of the Court of Appeals, like that of the Appellate Division before it, is barren of any reference to the admitted allegations of the complaint concerning the unique qualities of Suffolk's Southampton signs as efficient and inexpensive vehicles for conveying information, commercial and non-commercial alike.

Suffolk stated in its verified complaint that "many businesses, political and social entities rely heavily upon outdoor advertising to communicate their messages to the public because other forms of advertising are inefficient, inappropriate or prohibitively expensive." (A-110.) There has been no trial of that allegation, the truth of which must be accepted on the Town's motion to dismiss and which in any event is a rather modest statement of a proposition that is confirmed to the point of appropriate judicial notice by scholars (including foes of billboards), the advertising industry and the United States Congress — as well as those with practical experience in conveying their messages along Southampton's commercial thoroughfares through Suffolk's signs. Outdoor advertising, "the first medium employed in the United States,"[25] "is a relatively inexpensive, highly convenient, and markedly effective outlet for the promulgation of ideas and information by persons who do not themselves have access to more traditional media facilities." Stone, *Fora Americana: Speech In Public Places*, 1974 Sup. Ct. Rev. 233, 257; *see also* Lucking, *The*

[25]Geller, Advertising at the Crossroads 57 (1952). The first recorded use of outdoor advertising in America was a 1642 signboard in New Amsterdam. *Id.* By 1865, the industry had grown to the extent that 275 bill-posting companies were employing between two and twenty persons each. *Id.* at 58.

Regulation of Outdoor Advertising: Past, Present and Future, 6 Envt'l Aff. 179-80 and n.3 (1977).[26]

Outdoor advertising is the least expensive of the mass media for advertisers. For the year 1976 the average cost of reaching a thousand viewers, listeners or readers (CPM)[27] for some of the media were as follows: For 30-second commercials on prime time network television, $2.93, and on fringe time spot (local) television, $2.29; for 30-second commercials on network radio, $1.39, and for daytime spot radio, $1.94; for a thousand-line newspaper advertisement (less than half of one full-sized page), an average of $10.17; and for a one-page, four color ad in one of the top 50 magazines, an average of $6.77. The 1976 outdoor advertising CPM for a standard, large-scale showing was 41 cents.[28]

For the large, regional or national commercial advertiser then, all other mass media involve "more cost and less autonomy" than outdoor advertising. For the less affluent seeker of public recognition — the small, local retail business or the town or county political aspirant — the comparisons may be meaningless and the alternatives to billboards either "far from satisfactory" or entirely beyond reach. A candidate for local office in Southampton

[26]*See also* Federal Highway Beautification Act of 1965, 23 U.S.C. § 131; H.R. Rep. No. 1084, 89th Cong., 1st Sess., 2 U.S. Code Cong. & Ad. News 3710 (1965).

[27]There are two standard cost measures: CPM and cost per "gross rating point" (GRP), an advertising exposure equal to 1% of the population of an area.

[28]12 Media Decisions 109, 112 (Aug. 1977). If costs associated with advertising in some of the media mentioned in the text are measured according to the GRP index (note 27, *supra*), the comparative costs per GRP in New York City in 1976 were as follows: $26 for outdoor advertising, $84 for radio, $87 for television, and $154 for newspapers. Media Market Guide, New York Market Section (Summer, 1976); Pocket Guide to Outdoor Advertising 14 (1976).

does not have available a local VHF television station on which to purchase a 30-second spot; his choices are limited to two Connecticut and six New York City television stations, whose normal rates range from $1,000 to $6,000 for that half-minute.[29]

2. **Significant Governmental Interest.** The Court of Appeals held that regulation "for aesthetic purposes alone constitutes" such a governmental interest as justifies Southampton's ban on billboards, which were already restricted by ordinance to the commercial sections of the Town. The statement is utterly unenlightening. Each person is his or her own judge of the relative beauty of modern-day, standardized billboards and, say, Southampton's asphalt and fertilizer plants, dumps and automobile graveyards. The statement that the Town is regulating aesthetics helps not at all in determining whether Southampton acted legitmately. The Appellate Division in its opinion used some rather traditional First Amendment language, saying that because billboards are located out of doors and along some of Southampton's 510 miles of public streets and highways,[30] they preyed upon a "captive audience" that deserved protection from their "unsightly intrusion." On analysis those descriptions are no better than the Court of Appeals' conclusory statement as expressions of governmental interests sufficiently compelling to justify abridging the rights of Suffolk and its customers to speak through signboards.

The Appellate Division said that Suffolk's billboards, "thrust their message" upon pedestrians and motorists,

[29] 47 Television Factbook, Stations Volume 149-b, 152-b, 571-b-575-b (1978). One recent television critic, formerly president of a national advertising agency, concluded that "ordinary people and small businesses, even those which are successful by most standards, can rarely afford any advertising beyond the want ads, or a small local retail display." Mander, Four Arguments for the Elimination of Television 19 (1978).

[30] Master Plan at 7.

"thereby making them a captive audience," and that this imposition on the "captive audience" strips the billboards of all constitutional protection. (App. B, p. 21a.) This Court's decision in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), squarely refutes that conclusion.[31] In *Erznoznik*, an ordinance prohibited a drive-in movie theater from exhibiting films containing nudity where the screen was visible from a public street or place. Notwithstanding that drive-in theater screens are "invariably huge" and "a unique type of eye-catching display that can be highly intrusive and distracting," 422 U.S. at 221, 222 (Burger, C.J., dissenting), and that the screen in question "dominated the view from public places including nearby residences and adjacent highways" and a church parking lot, *id.* at 207, 221, the Court rejected the notion of visual captivity in the street and placed on the individual street traveler the burden of avoiding an offending "encounter":

> "The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are

[31] In Packer Corp. v. Utah, 285 U.S. 105, 110 (1932), relied upon by the Appellate Division, the Court indicated agreement with the proposition that billboards may be more intrusive than some other forms of advertising, see Bigelow v. Virginia, 421 U.S. 809, 828 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 221 (1975) (dissenting opinion), but that was in response to a claim that the equal protection clause invalidated a state statute prohibiting cigarette advertising on billboards but not through other media; there was no First Amendment claim. Moreover, the state interest in *Packer* was the most traditional and compelling, the physical health of its citizenry, particularly its children. In certain ways, then, the case parallels a more recent one, Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582, 585-86 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), which held, in part, that one medium (television) had particularly intrusive qualities that helped press cigarette advertising on children. "a group [a municipality] . . . has a right to protect," Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977).

> inescapably captive audiences for many purposes.' . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" 422 U.S. at 210-11.

The general lesson is this: Ordinances banning from the public streets or hallways of public buildings whole forms or categories of communications on a "captive audience" theory are not "reasonable . . . place regulations," because, unlike those in the vicinity of a sound truck, *Kovacs v. Cooper*, 336 U.S. 77 (1949), any offended citizen "could easily have avoided the display." *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Cohen v. California*, 403 U.S. 15, 21-23 (1971).[32] Moreover, the invocation of labels such as "captive audience" and "unsightly intrusion" simply diverts attention from the proper time-honored focal point of an analysis that combines history and function: "[W]hether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

[32] Although some courts have been unable to distinguish *Erznoznik* from this Court's earlier decision in Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974), *see, e.g.*, John Donnelly & Sons v. Outdoor Adv. Bd., 339 N.E.2d 709, 722 (Mass. 1975), this Court had no such difficulty: The issue in *Lehman* was whether a city, while "engaged in commerce" by providing a city transit system had created a "public forum" of its cars and therefore must rent space for the presentation of political views. 418 U.S. at 303. The Court in *Erznoznik* said that "the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street." 422 U.S. at 209-10 n.5.

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); *Pell v. Procunier*, 417 U.S. 817, 826 (1974); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). A recent, closely analogous application of this Court's "time, place or manner" standards is in a Ninth Circuit decision that this Court declined to review, *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977). In striking down on First Amendment grounds certain city ordinance limitations on the display of temporary political signs, the Court of Appeals reasoned, in part, as follows:

> "Communication by signs and posters is virtually pure speech . . . Posters and signs are erected adjacent to 'traditional first amendment forums, such as public sidewalks and other thoroughfares,' . . . where 'expressive activity may be restricted only for weighty reasons.'" 540 F.2d at 1366.

The "normal activity" to which the streets of the commercial and industrial districts of Southampton and other municipalities of its size and population are committed has been and remains thoroughly compatible with the clean, quiet and informative presence of signs such as Suffolk's. From the very birth of the modern American city, signs like Suffolk's have shared the streets with manufacturing plants, retail and wholesale commercial establishments, the clamorous commercial vehicles by which consumers are transported to those establishments, and with pickets, handbillers, political candidates' sound trucks, and political candidates themselves, all seeking to engage, however briefly, the attention of persons who are there to transact their business. Thus, even a staunch opponent of billboards has conceded that, "in a predominantly commercial zone, the billboard thrusts its message at an audience willing and eager to participate in the marketplace." Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future*, 6 Envt'l Aff. 179, 188 (1977).

If the labels "unsightly intrusion" and "captive audience" could serve as amulets for those who would banish media of communication that others only occasionally rail at, the airwaves would be silent, *see* Mander, *Four Arguments for the Elimination of Television* (1978), and, perhaps, the newspaper and magazine racks empty. In upholding the discretion of the Federal Communications Commission to permit licensee restrictions on the broadcast of paid editorial advertisements, this Court noted "the reality that in a very real sense listeners and viewers constitute a 'captive audience.'" *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973). More recently, the FCC has argued in this Court that certain content restrictions may be imposed on radio licensees "because of broadcasting's intrusion into the privacy of the home and its captivity of young unsupervised children." Brief for the Federal Communications Commission in FCC v. Pacifica Foundation, No. 77-528 at 28, 46 (Feb. 1978.)[33] Also of late, the Federal Trade Commission's Bureau of Consumer Protection has invoked the very same concepts of "captivity" and "intrusion" in its recommendation to the full Commission that it commence a rulemaking looking to the regulation of television advertising "of candy and other sugared products to children." *FTC Staff Report on Television Advertising to Children* at 267-77 (Feb. 1978). And Professor Haiman, writing before *Erznoznik*, brought the matter of labels full circle: "[G]iven the assumption that one browses through a newspaper or a magazine, he is just as subject to an unexpected full-page ad being 'thrust upon' him as when out driving on the highways — which he also makes a choice to do or not to do." Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 Nw. U.L. Rev. 153, 178 (1972).

[33]That document was soon followed by an FCC request for comments on what it characterized as the following "constitutional issue": "How do unsolicited telephone calls compare with highway billboards, loudspeakers on automobiles, radio and TV ads, newspaper and magazine ads, 'junk mail,' and door to door salesmen in terms of invasion of privacy." Notice of Inquiry In the Matter of Unsolicited Telephone Calls ("Junk Phone Calls"), FCC Docket No. 78-100, RM-2955 at 5 (March 30, 1978).

3. **The Regulation of Content.** Finally, the opinion of the Appellate Division — and the silence of the Court of Appeals in the face of it — suggests a question whether indeed Southampton's billboard ordinance can be "justified without reference to the content of the regulated speech." The Appellate Division indicated a belief that somehow outdoor advertising might properly be treated differently from other mass media because it is more predominantly commercial in content, *i.e.*, that the greater portion of Suffolk's sign space is sold rather than donated to charitable or other public causes, and that when space is purchased the greater portion of the displays on Suffolk's signs and those of other outdoor advertising companies are "commercial or product" and not political in nature.

Any such rationale is at odds with this Court's recent commercial speech decisions. They hold that "advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information," "indispensable" to "intelligent and well informed decisions" by the American consumer. *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 & nn. 27 and 28 (1977). First Amendment protection extends to the advertisement of all goods and services lawfully subject to public offer and purchase, whether they be prescription drugs, as in *Virginia Pharmacy Bd.*, realty, as in *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), contraceptives, as in *Carey v. Population Servs. Int'l, supra*, or legal services, as in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). To single out billboards for special treatment because they mostly advertise commercial

products is to trench on content in a way that those decisions necessarily condemn.

In any event, billboards are not different in the content of their communications from other media whose First Amendment protection would not be questioned. Of course, the greater portion of Suffolk's sign space is sold rather than donated to charitable or other public causes, although the amount of sign space donated annually by Suffolk and by the outdoor advertising industry as a whole is substantial.[34] Similarly, the greater part of the messages that Suffolk's signs and those of other billboard companies display when space is purchased are "commercial or product" and not political in nature. These facts do not bar Suffolk, or the nearly one-half billion dollar per year outdoor advertising industry of which it is a member from the right to exist as a medium of speech or press. The role of billboards in election campaigns as an inexpensive means of reaching vast numbers of voters is familiar to all of us and those who would further a variety of causes — abortion reform, school busing, the impeachment of the late Chief Justice Warren — have taken to billboards as a means of propagating their ideas. And if more billboard displays are intended to further commerce than political debate, commerce may also be said to permeate, if not to predominate in, other media in the United States of the 20th Century.

Take, as prime examples of the modern press, recent editions of three newspapers available to the residents of Southampton: the *New York Times*, *Newsday*, and the

[34]Consider just the one nationally available figure, the contribution made in 1976 by outdoor advertising industry members to the Advertising Council's major public service advertising campaign. Of the total media contribution estimated at "$547,448,107 worth of traceable advertising time and space," outdoor advertising companies contributed 8118 poster panels and seven painted bulletins, with an aggregate value of $4,275,595. Advertising Council Report to American People, 1976-1977, at 13 (1977).

Southampton Press, a weekly publication. In the Sunday *New York Times* of April 30, 1978, only 72 of 625 pages were free of commercial advertising. The comparable figures for that Sunday's *Newsday* were 104 of 417 pages, and for the April 27, 1978, *Southampton Press*, 1 of 20 pages. Television stations are allowed 16 commercial minutes an hour,[35] nearly all programming is sponsored by advertisers and, in the major markets, commercial message time ordinarily sells for upwards of $6,000 a half minute; for broadcast during particular programs, *e.g.*, the Baseball World Series, a 60-second spot may cost $180,000.[36]

For all the reasons stated above, the decision of the New York Court of Appeals in this case raises the most serious and substantial questions about the status of outdoor advertising under the First Amendment, and these questions should be explicitly resolved by this Court after plenary consideration.

II. A MUNICIPAL ORDINANCE THAT EFFECTS A TOTAL DESTRUCTION OF A DECADES-OLD BUSINESS BY REQUIRING THAT BUSINESS TO REMOVE ITSELF FROM THE TOWN, WITHOUT COMPENSATION, WHERE CONCEDEDLY THE CONTINUANCE OF THAT BUSINESS WILL NOT ADVERSELY AFFECT THE HEALTH, SAFETY OR TANGIBLE WELFARE OF OTHER PERSONS OR PROPERTY, DEPRIVES THE PROPRIETOR OF THE BUSINESS OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT

Under the decision of the court below, a sizeable, diversified community with a population that its planners expect

[35]47 C.F.R. § 0.281 (a)(7)(iii) (1977).

[36]47 Television Factbook, Stations Volume 571-b (1978); Broadcasting Magazine 73 (March 6, 1978).

will reach 250,000 by the end of the next decade, may, simply by the exercise of its police power and without resort to its power of eminent domain, effect a 171-square mile community-wide prohibition of billboards solely for "aesthetic" reasons and require the removal of existing billboards from the community without payment of just compensation. No prior decision of this Court sustains any such proposition.

This Court's decisions establish that regulation of the use of property, even quite drastic regulation, is permissible under the police power, but regulation that goes too far in impairing property values cannot be justified as an exercise of the police power and the power of eminent domain must be invoked. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922); *United States v. Causby*, 328 U.S. 256, 262 (1946). The criterion for how far is too far is "reasonableness," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and reasonableness depends on (1) the extent of the impairment of property values and (2) the necessity, in the public interest, of the regulation, *cf. Lawton v. Steele*, 152 U.S. 133, 137 (1894).

Following this Court's decision in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), state courts have held zoning restrictions prohibiting all use or the only economic use of property invalid under the Fourteenth Amendment. [37] The clearest cases for state courts have been those involving local efforts to effect city-wide exclusions of legitimate businesses; invariably, such exclusions have been held unreasonable on their face and therefore unconstitu-

[37] *See e.g.*, Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1, 16 (1957); Fenner v. City of Muskegon, 331 Mich. 732, 50 N.W.2d 210 (1951); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

tional.[38] This rule that exclusions of legitimate businesses from entire communities are unconstitutional has been applied to ordinances that attempt to exclude billboards from entire cities and towns.[39]

As authority for a total exclusion of billboards, including the elimination of existing signs, the Court of Appeals relied on two of its own decisions, *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749 (1967), and *People v. Goodman*, 31 N.Y.2d 262, 290 N.E.2d 139 (1972). Neither decision goes so far. In *Cromwell*, the court upheld a prospective exclusion of billboards from a town of 1,000 and applied it to billboards erected after the ordinance's effective date by the owner of a service station and restaurant.

[38] Amerada Hess Corp. v. Zoning Bd. of Adjust., 313 A.2d 787 (Pa. Cmwlth. 1973) (revolving signs); Beaver Gasoline Co. v. Zoning Hearing Bd., 445 Pa. 571, 577, 285 A.2d 501, 505 (1971) (gas stations); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (apartment units); Exton Quarries, Inc. v. Zoning Bd. of Adjust., 425 Pa. 43, 228 A.2d 169 (1967) (rock quarries); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W.2d 110 (1957) (drive-in theaters); People ex rel. Trust Co. v. Village of Skokie, 408 Ill. 397, 97 N.E.2d 310 (1951) (same).

[39] Metromedia, Inc. v. City of San Diego, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453 (4th Dist. 1977); City of Naples v. Polk, 346 So.2d 1076 (Fla. App. 1977); Combined Communications Corp. v. City and County of Denver, 542 P.2d 79 (Colo. 1975); Metromedia, Inc. v. City of Des Plaines, 26 Ill. App. 3d 942, 326 N.E.2d 59 (1975); Central Adv. Co. v. City of Ann Arbor, 391 Mich. 533, 218 N.W.2d 27 (1974); Norate Corp. v. Zoning Bd. of Adjust., 417 Pa. 397, 207 A.2d 890 (1965); Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); Central Outdoor Adv. Co. v. Village of Evandale, 54 Ohio Op. 354, 124 N.E.2d 189 (1954); Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 271 N.W. 823 (1937); Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909). Total exclusions of billboards have been thus invalidated even though for 60 years there has been no doubt of the constitutional power of communities to adopt regulations highly restrictive of billboards. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269 (1919).

And in *Goodman*, the court upheld the retrospective application of a sign-size limitation to a drugstore owner's shop sign in a tiny[40] Fire Island village of 200.[41]

In the cases cited above in which community-wide prohibitions of billboards or other legitimate businesses were invalidated by state courts, the municipalities involved tried to justify their regulations by reference to the traditional objects of the police power — the public health, safety, morals or welfare — and not merely to aesthetics. The question posed here is the more substantial for the fact that the court below eschewed any reliance on traditional police power goals and assumed that the Southampton ordinance was enacted for "aesthetic purposes alone."

It would be futile to argue, in the face of the modern law of the Fourteenth Amendment, that a valid state regulation

[40]The village "encompasses an area of about 1800 feet from ocean to bay and is accessible only by ferryboat." 31 N.Y.2d at 264, 290 N.E.2d at 140.

[41]The Appellate Division thought four decisions from other jurisdictions upheld a "city-wide prohibition" of billboards, Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); United Adv. Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); United Adv. Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952); and John Donnelly & Sons v. Outdoor Adv. Bd., 339 N.E.2d 709 (Mass. 1975). Each of the first three cases concerned an effort by a small residential town — with a population between 1,000 and 14,000 — to preserve its residential character. In none of the three was the removal of existing signs upheld. In *Westport* and *Metuchen*, the ordinances did not apply to existing signs; in *Raritan*, the removal of the existing signs was invalidated as a matter of state zoning law. Those cases, in short, are not precedent for what Southampton has undertaken to do. The extraordinary rationale of *Donnelly* is discussed below. (*See* p. 29, *infra*.) There is one other case that might have been cited below but was not. In Town of Boothbay v. National Adv. Co., 347 A.2d 419 (Me. 1975), the exclusion of one billboard from a coastal hamlet of 120 was upheld. The excluding regulation was sustained on the ground that it "may promote traffic safety by reducing accidents on the road or roadside," the court noting that "we need not now decide" the validity of other theories. 347 A.2d at 422.

must fit neatly within one or more of the categories that have traditionally marked the limits of the police power. Nevertheless, it remains the law of this Court that "to justify the State in . . . interposing its authority in behalf of the public it must appear, first, that the interests of the public . . . require such interference [with personal or property rights] . . . ." *Lawton v. Steele*, 152 U.S. 133, 137 (1894), quoted as "still valid today" in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *see also Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), where the Court in invalidating a zoning ordinance in its application relied in part on the findings below that "the health, safety, convenience and general welfare" would not be promoted by the ordinance in its effect on the property.[42]

To be sure, a state or one of its subdivisions may seek to preserve the pastoral appearance of a rural community, *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749 (1967), or the "architecture and the historic value" of New Orleans' Vieux Carre, *City of New Orleans v. Impastato*, 198 La. 206, 211, 3 So.2d 559, 561 (1941), or "an historic and literary shrine of singular interest" such as Concord, *General Outdoor Adv. Co. v. Department of Public Works*, 289 Mass. 149, 197, 193 N.E. 799, 821 (1935), or "a quiet place where yards are wide, people few, and motor vehicles restricted," *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). But the conclusion of the court below — that "aesthetic purposes alone" justify the elimination of the billboards in Southampton — begs the question: What

[42]The Court's ability to discern a state interest in safety weighty enough to justify a severe impairment of property values through a prohibition on use no doubt explains the decision in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), where the Court found it unnecessary to mention Nectow v. City of Cambridge, 277 U.S. 183 (1928). *Cf.* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342, *appeal dismissed per curiam*, 371 U.S. 36 (1962).

"aesthetic" purpose of the kind just suggested is advanced by expelling billboards from every one of Southampton's 510 miles of streets and 17 types of zoning districts?

When aesthetics have been invoked as a basis for government action, most courts, unlike the court below, have been particularly sensitive to the impact of the action on property interests, because "to sanction legislation guided by a standard that even philosophers cannot define to their colleagues' satisfaction has seemed to involve sacrificing private property rights for the whims of personal taste." Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 St. Louis U.L.J. 191, 195 (1963).[43] The Ohio Supreme Court aptly described, 50 years ago, the problem of basing legislation on shifting tastes: "Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats." *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

Before the decision of the court below, only one state's highest court had upheld as a reasonable exercise of the

[43]Scholars in other disciplines have failed even in efforts to discern the predominant "personal taste." Thus, in a 1969 study of viewer reaction to roadside environment, only 30% of a random selection of individuals favored the complete elimination of billboards. Herrmann, *Human Response to Visual Environments in Urban Areas*, Outdoor Advertising: History and Regulation 57, 63 (Houck, ed. 1969). And in a series of tests designed to measure response to change in the physical environment caused by the removal of billboards, only 32.4% of that same group noticed any change in the commercial zone. *Id.* at 71. Moreover, there are those who have aesthetic preferences for sign-studded landscapes, including highly-trained professional architects who have written in support of their views, *see* Venturi, Brown and Izenour, Learning From Las Vegas 51-52, 100-01, 128-30, 162-63 (1972). The citizens of San Francisco and Seattle have voted down legislation that would have effected city-wide bans on billboards. *See* San Francisco Chronicle, Nov. 9, 1977, at 1, col. 5; Seattle Post-Intelligencer, Nov. 7, 1973, at A3, col. 1.

police power a municipality-wide, retroactive ban of outdoor advertising businesses. That was the Massachusetts Supreme Judicial Court in *John Donnelly & Sons* v. *Outdoor Adv. Bd.*, 339 N.E. 2d 709 (Mass. 1975), and it acted on an erroneous interpretation of this Court's decision in *Berman* v. *Parker*, 348 U.S. 26 (1954). While it acknowledged that *Berman* was an eminent domain case, and thus involved the payment of compensation, it concluded that *Berman's* "expansive view" of the general welfare is applicable to the zoning power. 339 N.E.2d at 717. The decision in *Berman* is not authority for the sufficiency of "aesthetic[s] . . . alone" as a state interest justifying the uncompensated destruction of a business.[44]

If *Berman* is to be extended to become a justification for the uncompensated taking of property maintained, improved and taxed for decades simply because today's state judges or town fathers conclude that it is more of an "unsightly, constant, immutable intrusion" than an open-pit mine, an asphalt plant, a garbage dump, an automobile junkyard or a stockcar racing track, it is up to this Court to say so. The facts of this case argue compellingly against any such extension of *Berman*. Southampton's town planners seek for it the benefits of the "development tide from the west" and expect that it will assume a central place in the future growth of Suffolk County as the population of the

[44]Professor Williams, perhaps the leading American exponent of aesthetic zoning and of billboard regulation, has said:

> "Since the case [*Berman v. Parker*] involved use of eminent domain, with compensation, it is not really in point on regulation by the police power, without compensation. It is one thing to say that aesthetics are an appropriate consideration in deciding whether to condemn and pay; it is quite a different matter to decide that the same considerations are appropriate as a basis for police power regulations." 1 Williams, *American Land Planning Law* §11.18 at 267 (1974).

county swells toward two million. Although, like communities to its west, such as Hempstead, Oyster Bay and New York City, Southampton boasts handsome residential neighborhoods, it teems with commercial and industrial activity, which exists by reason of a 21-year-old comprehensive zoning ordinance designed to encourage such activity. As with Suffolk's billboards, Southampton's gas stations, theaters and used-car lots are found on the major traffic arteries, because it is along these streets that traffic flows between New York City and Montauk Point and among Long Island's many communities. Neither they nor Suffolk's billboards can be displaced without compensation merely because they may be regarded as unsightly.[45]

[45]The question whether the three-year so-called amortization period allowed between the enactment of the Southampton ordinance and the compelled removal of billboards is "reasonable" remains open under the decision below. (App. A, pp. 4a-5a.) By the terms of the ordinance itself, the reasonableness of the period may be challenged in an administrative proceeding before Town officials. A grace period of whatever length is not the equivalent of just compensation, and in any event the Court of Appeals said that to satisfy its standard of reasonableness "a billboard owner . . . need not be given that period of time necessary to permit him to recoup his investment entirely." (App. A, p. 5a.) A grace period, especially one so limited, is no more "just compensation" than the "transferable development rights" involved in Penn Central Transp. Co. v. City of New York, No. 77-444, pending decision following argument. Just compensation means "a full and perfect equivalent for the property taken," Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893), or "the full monetary equivalent of the property taken," United States v. Reynolds, 397 U.S. 14, 16 (1970); United States v. General Motors Corp., 323 U.S. 373, 379 (1945).

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary consideration on its merits.

Respectfully submitted,

WILLIAM H. ALLEN
MICHAEL A. SCHLANGER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CARL W. PETERSON, JR.
Hancock, Estabrook, Ryan,
Shove & Hust
One Mony Plaza
Syracuse, New York 13202

Attorneys for Appellant

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APPENDIX A

OPINION

STATE OF NEW YORK
COURT OF APPEALS

2 No. 545
The Suffolk Outdoor Advertising
Co., Inc., Respondent-Appellant,
vs.
Theodore O. Hulse, & ors.,
constituting the Town Board
of the Town of Southampton,
Appellants-Respondents.

Collum Signs, Inc.,
vs.
Town Board of the Town of
Southhampton,

Frank J. Polecek, Jr., d.b.a.
Behrle Outdoor Advertising,
vs.
Town Board of the Town of
Southampton.

* * *

JASEN, J.:

The principal question posed on these cross-appeals is whether a local zoning ordinance requiring the removal of all off-premises or non-accessory billboards throughout the town is an unconstitutional exercise of the police power.

On May 2, 1972, the Town of Southampton adopted Building Ordinance No. 26, which prohibited the erection of all non-accessory billboards (§ 3-50-60.70) in all districts throughout the Town. The ordinance further provided for the removal of all nonconforming billboards on or before June 1, 1975 (§ 3-110-70.03). However, owners of nonconforming billboards were given the opportunity to apply for an extension of the amortization period prescribed by the ordinance (§ 3-110-70.04). Exception was also made for the Town of Southampton to establish public information centers where business signs could be located (§ 3-50-60.07).

Plaintiffs, owners of nonconforming billboards located in the Town of Southampton, seek a declaration that the ordinance in question is unconstitutional in that it is not reasonably related to public safety and welfare. We hold that the ordinance is reasonably related to public safety and welfare, and, as such, is a valid exercise of the police power.

Initially, we reject plaintiffs' contention that the prohibition of non-accessory billboards constitutes a violation of the right to free speech guaranteed by the First Amendment. While the Supreme Court has held that commercial speech falls within the protection of the First and Fourteenth Amendments, the Court recognized that a state may regulate the time, place or manner of commercial speech — as opposed to its content — to effectuate a significant governmental interest (*Virginia State Board of Pharmacy* v *Virginia Citizens Consumer Council, Inc.*, 425 US 748, 770-771.) We believe that the regulation of aesthetics constitutes such an interest. Since the challenged

ordinance makes no attempt to regulate the content of the commercial speech appearing on billboards, but rather regulates only the place and manner in which billboards may be maintained, we conclude that the ordinance does not infringe the right to free speech guaranteed by the First Amendment.

The authority of the State and its political subdivisions to regulate outdoor advertising pursuant to the police power is well settled. (See e.g., *People* v *Goodman*, 31 NY2d 262; *New York State Thruway Auth* v *Ashley Motor Ct.*, 10 NY2d 151; *People* v *National White Plains Corp.*, 299 NY 694; 1 Anderson, New York Zoning Law and Practice [2d ed], § 11.54; 2 N Y Jur, Advertising and Advertisements, § 7; 82 Am Jur 2d, Zoning and Planning, § 125; Ann, Billboards—Municipal Regulation, 58 ALR 2d 1314.) Certainly, where the primary purpose for which outdoor advertising is regulated is the public health or safety, there is no doubt that the objective of the regulation lies within the permissible bounds of the police power. (See e.g., *New York State Thruway Auth.* v *Ashley Motor Ct.*, 10 NY2d 151, *supra; Whitmier and Ferris Co.* v *State of New York*, 20 NY2d 413; 1 Anderson, New York Zoning Law and Practice [2d ed], § 11.55.) Although once open to question, it is now equally clear that the regulation of outdoor advertising for aesthetic purposes alone constitutes a valid exercise of the police power. (See *Matter of Cromwell* v *Ferrier*, 19 NY2d 263; *People* v *Goodman*, 31 NY2d 262; *Rochester Poster Adv. Co.* v *Town of Brighton*, 49 AD2d 273; 1 Anderson, New York Zoning Law and Practice [2d ed], §§ 7.07, 11.54; 6 N Y Jur, Zoning and Planning laws, § 123.)

Once it is established that a regulation enacted pursuant to the police power has a valid basis, it need only be shown to sustain its constitutionality that it is reasonably related to the objective for which it was enacted. (*Matter of Cromwell* v *Ferrier*, 19 NY2d at p 272, *supra; People* v *Goodman*, 31 NY2d at p 266, *supra.*)

Turning to an analysis of the reasonableness of the Southampton ordinance, we note that the facts in the present case are strinkingly similar to those in *Matter of Cromwell* v *Ferrier (supra).* In *Cromwell,* the Town of Wallkill adopted a zoning ordinance which implicitly prohibited non-accessory signs throughout the town. In upholding the constitutionality of the ordinance, we recognized that "[a]dvertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction, and deterioration." (19 NY2d at p 272, *supra.*) While we cautioned that the police power should not be employed to cure every artistic nonconformity, we nevertheless sustained the ordinance as reasonable since it was substantially related to promoting the general welfare of the community. (19 NY2d 263, *supra;* see also, *People* v *Goodman,* 31 NY2d at p 266, *supra.*)

Just as in *Cromwell,* the ordinance under attack in this case prohibits non-accessory billboards and signs. It cannot be seriously argued that a prohibition of this nature is not reasonably related to improving the aesthetics of the community. Nor can it be said that it is oppressive. (See *People* v *Goodman,* 31 NY2d 262, *supra.*) Although prohibiting non-accessory billboards, the ordinance permits the maintenance of accessory or on-premises billboards, thus providing an operative means of advertising.

We therefore hold that aesthetics constitutes a valid basis for the exercise of the police power and that the Southampton ordinance prohibiting non-accessory billboards is substantially related to the effectuation of this objective.

Although the Southampton ordinance is constitutional on its face, its validity is also dependent upon its reasonableness, as applied. The underlying issue in making this determination is whether the amortization period provided by the ordinance is reasonable. While the purpose of an amortization period is to provide a billboard

owner with an opportunity to recoup his investment, an owner need not be given that period of time necessary to permit him to recoup his investment entirely. Nor, however, should the amortization period be so short as to result in a substantial loss of his investment. In this respect, the plaintiffs should be entitled to show that the 3-year amortization period provided in the Southampton ordinance is unreasonable, as applied. (See *Modjeska Sign Studios, Inc.* v *Berle,* ____ NY2d ____ [decided herewith].

However, unlike the statute challenged in *Modjeska (supra),* the ordinance in this case affords plaintiffs an opportunity to obtain an extension of the amortization period if it can be established that, "as to a particular sign", the amortization period of three years is unreasonable. (See Building Ordinance No. 26, § 3-110-70.04). This the plaintiffs concededly failed to do. We believe that the plaintiffs were required to exhaust the administrative remedy available under the ordinance before instituting this action. Until plaintiffs make application to the Town Board for an extension of the amortization period and the Town Board renders a determination thereon, we can only speculate as to the total amortization period which plaintiffs may have been granted under the ordinance. Hence, it would be premature for a court to pass upon the reasonableness of the amortization period, as applied.

Lastly, we find no merit to plaintiffs' claim that the Federal Highway Beautification Act of 1965 (23 USC § 131) and section 88 of the Highway Law preclude the removal of nonconforming billboards without compensation. (See *Modjeska Sign Studios, Inc.* v *Berle, supra.*)

Accordingly, the order of the Appellate Division is modified in accordance with this opinion, and as so modified, should be affirmed, with costs for the defendants. The statute is declared valid and the certified question is answered in the negative.

FUCHSBERG, J. (dissenting opinion).

I dissent from so much of the majority's opinion as holds that the challenged Southampton ordinance is in consonance with the First Amendment. To my mind this measure, which with insubstantial exceptions prohibits non-accessory billboards anywhere in the Town, passes beyond the bounds of a reasonable regulation of the time, place, and manner of expression and constitutes an outright ban on a significant form of communication. Indeed, it is far from certain that it would even allow the use of billboards for political, charitable or religious causes.

In any event, I believe it unnecessary to comment at length upon the progressive fading of the distinction between "commercial" and "non-commercial" speech (see *Linmark Associates* v. *Willingboro*, 431 US 85; *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 US 748), or to restate my grounds for believing that the distinction must be altogether effaced (*People* v. *Remeny*, 40 NY2d 527, 530 [concurring opn]). Clearly the earlier cases in this area can no longer be accepted uncritically.

Suffice it to say that billboards are essentially neutral vehicles for expression, as open to all kinds of messages as are the racks in a bookstore, the advertising columns in a newspaper, or the stage and screen in a theater. It has long been recognized that these forms of communication, although operated commercially, are entitled to a full measure of First Amendment protection (*Erznoznik* v. *Jacksonville*, 422 US 205; *Smith* v. *California*, 361 US 147; *Grosjean* v. *American Press Co.*, 297 US 233; cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm. on Human Relations*, 413 US 376.) Of course, aesthetic and environmental preservation are valid goals for municipal planning and in the exercise of their zoning functions for such purposes communities have considerable elasticity in deciding where billboards may be placed (cf. *Young* v. *American Mini*

Theatres, 427 US 50). However, the ordinance before us, by its exclusion of virtually all non-accessory billboards throughout the large area encompassed by the Town, goes far beyond the limits of regulation. I would therefore vote to hold the ordinance, as currently drafted, unconstitutional.

* * * * *

Order modified, with costs to defendants, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative. Opinion by Jasen, J. All concur except Fuchsberg, J., who dissents and votes to reverse and declare the ordinance unconstitutional in an opinion.

Decided December 21, 1977.

APPENDIX B

SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT.

HOPKINS, Acting P.J., SHAPIRO, TITONE, SUOZZI and Mollen, JJ.

SUFFOLK OUTDOOR ADVERTISING CO., INC.,
Respondent-Appellant,

-against-

THEODORE O. HULSE et al., constituting the Town Board of the Town of Southampton,
Appellants-Respondents.

COLLUM SIGNS, INC.,
Respondent,

-against-

TOWN BOARD OF THE TOWN OF SOUTHAMPTON,
Appellant.

FRANK J. POLACEK, JR., d/b/a BEHRLE OUTDOOR ADVERTISING,
Respondent,

-against-

TOWN BOARD OF THE TOWN OF SOUTHAMPTON,
Appellant.

THE H.C. WILLIAMS CO. INC.,
Respondent-Appellant,

-against-

TOWN OF SOUTHAMPTON,
Appellant-Respondent.

CROSS APPEALS in the first above-captioned action from so much of an order of the Supreme Court at Special Term (LAWRENCE J. BRACKEN, J.), dated March 30, 1976 and entered in Suffolk County, as, *inter alia*, dismissed the fourth and fifth causes of action asserted in the complaint therein.

APPEALS by defendant in the second and third above-captioned actions from so much of the same order as

denied their separate cross motions to dismiss the first cause of action asserted in the complaints of the plaintiffs in those actions.[1]

CROSS APPEALS in the fourth above-captioned action from an order of the same court, dated March 30, 1976, as corrected by a further order of the same court, dated April 19, 1976, which, *inter alia*, dismissed the fourth and fifth causes of action asserted in the complaint therein.

* * *

MOLLEN, J. These appeals are addressed to the sensitive issue of balancing the right of the Town of Southampton to exercise its police power to promote the public safety and welfare of its inhabitants with the right of the outdoor advertising industry to engage freely in activity which would otherwise be legal but for the prohibition contained in the ordinance herein involved.

On May 2, 1972 the Town of Southampton adopted Building Zone Ordinance No. 26, which, *inter alia*, required the removal of all nonconforming billboards (off-premises and nonaccessory) on or before June 1, 1975 (§ 3-110-70.03), and provided for application by the owners of such billboards to the Town Board for an extension of the amortization period (§ 3-110-70.04) and prohibited the erection of such billboards in all districts throughout the town, but provided that the town might establish public information centers where approved directional signs for businesses might be located (§ 3-50-60.07).

The plaintiffs, owners of billboards situated at various locations in the Town of Southampton, commenced separate actions to enjoin the defendants from enforcing the ordinance and seeking money damages. The complaints, *inter alia*, alleged:

(1) that the ordinance provision which required removal of the billboards was unconstitutional

(a) on its face as a violation of their first amendment rights of free expression;

(b) "as applied" to the respective plaintiffs as unreasonable and confiscatory; and

(c) as preempted by the Federal Highway Beautification Act of 1965 and section 88 of the Highway Law; and

(2) that the ordinance provison which prohibits such billboards throughout the entire Town of Southampton is unconstitutional on its face because it does not reasonably relate to the public safety and welfare.

All of these claims withstood the defendants' respective motions and cross motions to dismiss.[2] Each complaint also contained a claim for damages which was dismissed at Special Term.[3]

The plaintiff Suffolk Outdoor further alleged in its fourth cause of action that the ordinance provision which required the removal of the billboards is unconstitutional as violative of the equal protection clause. This cause of action was dismissed upon the defendants' cross motion.

The plaintiff Williams also alleged in its fourth cause of action that the ordinance provision regarding amortization procedures was unconstitutional because it did not set forth adequate standards for its application. This cause of action was also dismissed at Special Term.

Lastly, Suffolk Outdoor's motion for a preliminary injunction was also denied.

The defendants urge that none of the plaintiffs' claims constitute a viable cause of action. Moreover, they contend that the plaintiffs are precluded from attacking the subject "removal" provision as unconstitutional as applied for failure to exhaust their administrative remedies; and that the plaintiffs' allegations that the "prohibition" provision

is unrelated to safety and public welfare are insufficient because they are conclusory in nature.

Subsequent to the commencement of these actions, Suffolk Outdoor applied by letter to the Town Board for an extension of time. Although Suffolk Outdoor was notified that the letter was insufficient in form, it did not submit any further request for an extension of time. None of the other plaintiffs attempted to obtain an extension.

On June 16, 1976, this court directed that the appeals and cross appeals be heard together.

MAIN APPEAL BY THE DEFENDANTS.

There are four issues presented in the main appeal:

(1) Whether the "prohibitory" provision is unconstitutional because it does not reasonably relate to the public safety and welfare;

(2) Whether the "removal" provision violates the plaintiffs' first amendment right of freedom of expression;

(3) Whether the "removal" provision is in conflict with a State policy allegedly embodied in section 88 of the Highway Law; and

(4) Whether the plaintiffs' failure to exhaust their administrative remedies precludes their claim that the "removal" provision is unconstitutional "as applied".

CROSS APPEAL BY PLAINTIFFS SUFFOLK OUTDOOR AND WILLIAMS.

There are four issues raised on the cross appeals:

(1) Whether the administrative remedy contained in the subject ordinance is unconstitutionally vague and/or procedurally invalid;

(2) Whether the "removal" provision constitutes a denial of equal protection;

(3) Whether an action for damages properly lies against the Town of Southampton for its enforcement of the ordinance; and

(4) Whether the plaintiff Suffolk Outdoor is entitled to a preliminary injunciton.

We modify the orders by dismissing those portions of (1) Suffolk Outdoor's first, second and third causes of action, (2) Collum's first cause of action, (3) Polacek's first cause of action, and (4) Williams' first, second and third causes of action, which assert the invalidity of the subject ordinance on grounds other than the assertion that the provision thereof which prohibits billboards is not reasonably related to public safety and welfare. In all other respects we affirm.[4]

The only theory posited by the plaintiffs which we find viable is their claim that the ordinance provision which prohibits billboards and signs is unconstitutional on its face because it does not reasonably relate to the public safety and welfare. We believe that the complaint sets forth sufficient allegations to create a factual issue and that the matter should be determined at trial.

The ordinance under the review permits on-premises (i.e. accessory) billboards and signs, but prohibits off-premises (i.e., nonaccessory) billboards and signs in all districts of Southampton, with the exception that the town may establish special public information centers where approved directional signs for businesses may be located.[5]

The courts of this State have heretofore upheld municipal ordinances prohibiting billboards throughout an entire municipality. In *Matter of Cromwell* v *Ferrier* (19 NY2d 263), wherein this very issue was directly involved, the Court of Appeals upheld a zoning ordinance which permitted accessory signs but implicitly prohibited nonaccessory signs throughout the entire Town of Wallkill. In doing so, the court specifically and directly overruled *Matter of Mid-State Adv. Corp.* v *Bond* (274 NY 82), wherein the Court of Appeals had made a distinction between ordinances which were merely regulatory and those which were prohibitory in nature. Judge BREITEL, speaking on behalf of the majority of the court in *Cromwell*, in the course of a comprehensive opinion, directed himself to that issue as follows (p. 268):

> "It is concluded that the decisional as well as the practical bases for the holding in *Bond (supra)* are either no longer valid or have changed so considerably that the case should be overruled."

Judge BREITEL went on to say (p. 269):

> "One important factor in the courts' increasingly permissive treatment of similar zoning ordinances has been the gradual acceptance of the conclusion that a zoning law is not necessarily invalid because its primary, if not its exclusive objective, is the esthetic enhancement of the particular area involved, so long as it is related if only generally to the economic and cultural setting of the regulating community."

Again, Judge BREITEL stated (p. 271):

> "It has long been settled that the unique nature of outdoor advertising and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purpose of governmental regulation and restriction."

The Court of Appeals, in *Cromwell*, set forth the sole criteria to be applied in determining the validity of this type of ordinance, namely, reasonableness. The court held (p. 270):

"Consequently, insofar as the *Bond* holding *(supra)* was predicated on the now discarded notion that esthetic objectives alone will not support a zoning ordinance, it may no longer be a valid precedent. But as pointed out in *Stover ([People* v. *Stover,* 12 NY2d 462*], supra)*, the question remains whether such an ordinance should still be voided because it constitutes an '"unreasonable device of implementing community policy"' * * * In nearly all [decisions of this court], zoning ordinances which have distinguished between accessory and nonaccessory signs have been upheld, providing that the distinctions were applied in a reasonable manner."

The Court of Appeals pointed out (p. 272):

"In concluding that the ordinance is constitutional and that the restrictive outlook of the *Bond* case *(supra)* should no longer be followed, it does not mean that any esthetic consideration sufices to justify prohibition. The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those esthetic considerations which bear substantially on the economic, social, and cultural patterns of a community or district. Advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction, and deterioration. They are just as much subject to reasonable controls, including prohibitions, as enterprises which emit offensive noises, odors or debris. The eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern."

Clearly the cogent dissent by Judge FINCH in *Matter of Mid-State Adv. Corp.* v *Bond* (274 NY 82, supra) has now become the prevailing viewpoint in New York. Noteworthy in this regard are Judge FINCH's comments (p. 89):

> "Perhaps factories, stores and the industrial sections of a city naturally tend to be ugly, but it does not follow that business may not be carried on amid more pleasant surroundings. Certainly any city enacting such an ordinance would present a more pleasing picture to the eye than one plastered with blatant signboards * * * A city might well conclude that it is more likely to attract commercial enterprises and permanent residents if it improves its appearance; that its residents will gain financially by such an improvement; or that the elimination of distracting and annoying billboards will add to the physical and mental well-being of its inhabitants * * * The billboard eyesore is in many ways akin to annoying sounds and undesirable odors which undoubtedly can be prohibited. Although such restrictions may be more desirable in residential areas, nevertheless, their extension to business districts cannot be termed unreasonable."

Thereafter, the Court of Appeals had occasion to address itself to this again in *People* v *Goodman* (31 NY2d 262). The issue arose in a somewhat different manner. In that instance the Village Board of the Village of Ocean Beach, Suffolk County, enacted an ordinance somewhat similar in nature to the one herein under consideration. However, it also contained penal sanctions for failure to remove offending signs. The defendant, a pharmacist, refused to remove the prohibited sign, alleging, among other reasons, that his drugstore rendered a public service, and that the ordinance, as applied to him, exceeded the village's authority under its police powers. The defendant was

prosecuted, found guilty and appealed. The Court of Appeals, in a unanimous opinion, affirmed the conviction and reiterated its position as to the validity of such ordinances. In doing so it dismissed a number of constitutional issues raised by the defendant and again postulated the sole test to be that of reasonableness. Judge JASEN stated (p. 265):

> "We conclude that this ordinance represents a valid and permissible exercise of the police power and that the defendant's conviction thereunder was proper and should be affirmed.
>
> * * *
>
> "It is now settled that aesthetics is a valid subject of legislative concern and that reasonable legislation designed to promote the governmental interest in preserving the appearance of the community represents a valid and permissible exercise of the police power. (*People* v. *Stover*, 12 NY2d 462.) Under the police power, billboards and signs may be regulated for aesthetic purposes." (Citing numerous cases.)

Judge JASEN continued on to declare (pp. 265-266):

> "In the case before us, we deal with an ordinance concededly motivated by aesthetic considerations. Of course, as with every enactment under the police power, this measure must satisfy the test of reasonableness. (Citing cases.) Our inquiry, therefore, is *limited* to determining whether, under all the circumstances, the means adopted in this ordinance are *reasonably related* to the community policy sought to be implemented, *and are not unduly oppressive*" (emphasis supplied).

Judge JASEN further stated (p. 267):

> "In sum, this ordinance merely proscribes the erection and maintenance of commercial signs which, in the circumstances and setting here present, would be unnecessarily offensive to the visual sensibilities of the average person and would materially detract from the community and district pattern. (*Matter of Cromwell* v *Ferrier*, 19 NY2d 263, *supra; People* v *Stover*, 12 NY2d 462, *supra; New York State Thruway Auth.* v *Ashley Motor Ct.*, 10 NY2d 151, *supra.*)"[6]

Plaintiffs contend that ordinances of the type herein involved are violative of the fundamental right of freedom of expression. This contention has great appeal in a society such as ours, where few, if any, rights are more cherished or given greater or more zealous protection. Nevertheless, we find no merit to such claim in the instant circumstances. In this regard it is noteworthy that in the *Cromwell* and *Goodman* cases, heretofore cited and quoted at length, the Court of Appeals, in exploring the various claims of unconstitutionality as to ordinances of similar nature, expressed no concern or qualms regarding any restriction on freedom of speech. Similarly, in *New York State Thruway Auth.* v *Ashley Motor Ct.* (10 NY2d 151), wherein the Court of Appeals sustained the validity of a statute restricting the erection of billboards and other advertising devices along the Thruway, Judge FULD, writing on behalf of a unanimous court, disposed of a number of constitutional issues, but expressed no concern as to any diminution of the right of free speech. In *People* v *Stover* (12 NY2d 462) the Court of Appeals sustained the validity of an ordinance which clearly and concededly had as its purpose and major motivation the stifling of a "peaceful protest" by the defendants therein. In that case, the specific issue before the court was the contention that the ordinance represented

an infringement of the right of freedom of speech. In the face of such contention, and after conceding that the non-verbal proscribed activity was a form of free speech within the meaning of the First Amendment, the court nevertheless affirmed the convictions and sustained the ordinance as a valid exercise of police power. Even the lone dissenter, Judge VAN VOORHIS, began his dissenting opinion with the following statement (p. 470):

> "My concern in this case is not with limitation of free speech nor whether aesthetic considerations are enough in themselves to justify zoning regulations in prescribed instances, but with the extent to which a municipality can go in restricting the use of private property."'

It may well be that *Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council* (425 US 748) may be construed by some to hold contrary to the position taken by this court on the question of infringement of free speech. However, a careful analysis of the parameters of the holding in the *Virginia* case clearly leads to the conclusion that the ordinance in the instant case does not come within the proscription of that case. The Supreme Court therein held that commercial speech, *per se*, is not outside the protection of the First Amendment, contrary to the position maintained previously in *Valentine* v. *Chrestensen* (316 US 52) and subsequently modified in *Bigelow* v. *Virginia* (421 US 809). The Virginia statute, however, involved a *total* ban on publication or advertisements of any kind whatsoever. Insofar as is pertinent herein, that statute read as follows:

> "Any pharmacist shall be considered guilty of unprofessional conduct who * * * or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription." (*Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council*, 425 US 748, 750, n.2, *supra*)

Obviously, the above-quoted statute is an all-encompassing effort to prevent the dissemination of certain information in any manner whatsoever. As the Supreme Court pointed out in its opinion, such statute has as its purpose and result not only the complete stifling of the freedom of speech right of the one so proscribed, but it as well deprives the general public of the correlative right to receive such information. Considerations of aesthetics or other appropriate governmental concerns, such as public interest and safety, were not involved and not protected by the statute found to be offensive to the concept of freedom of speech.

Mr. Justice BLACKMUN, writing the majority opinion for the court, posited circumstances which lead to the conclusion that statutes such as the one involved herein are valid exercises of police power. He stated (425 US at pp. 770-771):

> "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.
>
> "There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they

serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Compare *Grayned* v *City of Rockford*, 408 US 104, 116 (1972); *United States* v *O'Brien*, 391 US 367, 377 (1968); and *Kovacs* v *Cooper*, 336 US 77, 85-87 (1949), with *Buckley* v *Valeo* [424 US 1 (1976)], *supra*; *Erznoznik* v *City of Jacksonville*, 422 US 205, 209 (1975); *Cantwell* v *Connecticut*, 310 US at 304-308; and *Saia* v *New York*, 334 US 558, 562 (1948). Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely."

In his concluding paragraph (p. 773), Mr. Justice BLACKMUN very succinctly presented the sole issue decided in the *Virginia* case:

> "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative."

Similarly, *People* v *Remeny* (40 NY2d 527) is not controlling on the issues herein. In that case the Court of Appeals, in a four to three decision, held unconstitutional an ordinance which prohibited the distribution of commercial leaflets in "all public places, at all times and under all circumstances" as violative of the First Amendment, citing the Virginia case (supra). It should be noted that handbills are transitory in nature and that potential recipients of handbills are free to reject them. Contrariwise, billboards

thrust their message upon passersby, thereby making them a captive audience (see *John Donnelly & Sons* v *Outdoor Adv. Bd.* (339 NE2d 709 [Sup. Ct., Mass., 1975]). Billboards are an unsightly, constant, immutable intrusion upon all who come within their orbit. They also present a safety concern not present in the distribution of handbills.

In this regard, Mr. Justice BRANDEIS aptly observed:

> "'Billboards, street car signs, and placards and such are in a class by themselves * * * Advertisements of this sort are constantly before the eyes of observers on the streets * * * to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer * * * In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard'" (*Packer Corp.* v. *Utah*, 285 US 105, 110).

In *General Outdoor Adv. Co.* v *Department of Public Works* (289 Mass 149, app. dsmd. 297 US 725), the court, addressing itself to the outdoor advertising industry, stated:

> "[I]t is forcibly thrust upon the attention of all such persons [who travel on the highways] whether willing or averse. For such persons who strongly wish to avoid advertising intrusion, there is no escape; they cannot enjoy their natural and ordinary rights to proceed unmolested." (See, also, *Lehman* v *City of Shaker Heights*, 418 US 298, 302.)

We believe that the instant ordinance more appropriately belongs within the ambit of reasonable exercise of police power alluded to by Mr. Justice BLACKMUN in the above-quoted portion of his opinion in the *Virginia* case.

The plaintiffs have apparently abandoned their claim that the town's ordinance is preempted by the Federal Highway Beautification Act of 1965. Instead, they contend that the town ordinance is in conflict with a State policy which requires that compensation be paid for the removal of the billboards along federally aided and interstate highways, as reflected in section 88 of the Highway Law. We find no merit in this contention. Nor do we find any merit to plaintiff Suffolk Outdoor's allegation that the ordinance violates that plaintiff's rights to equal protection under the Fourteenth Amendment.

Plaintiffs have further challenged this ordinance on the ground that it is unconstitutional "as applied" to their property. Such contention may not be raised until such time as they have exhausted their administrative remedies (see *Old Farm Road* v *Town of New Castle*, 26 NY2d 462, 464; *Janas* v *Town Bd. of Town of Fleming*, 51 AD2d 473; 2 Anderson, New York Zoning Law and Practice, § 21.10). Heretofore, none of the plaintiffs proceeded in accordance with the administrative remedies provided for in the ordinance.

Plaintiff Williams has pleaded and urged that the amortization provisions of the ordinance are unconstitutional because they are imprecise and vague. We find that the administrative remedy as contained in the ordinance is not unconstitutionally vague. A delegation of power from a local legislative body, such as the Town Board, to a Zoning Board of Appeals, to grant or deny special permits or exceptions, must be accompanied by standards sufficient to guide the discretion to be exercised by the Zoning Board of Appeals (2 Anderson, New York Zoning Law and Practice, § 19.11). However, no standards are required where a legislative body reserves such power to itself (*Matter of Larkin Co.* v *Schwab*, 242 NY 330, 333-334; *Matter of Green Point Sav. Bank* v *Board of Zoning Appeals of Town of Hempstead*, 281 NY 534, 538; *Matter of 4M Club* v *Andrews*, 11 AD2d 720; *Matter of Shell Oil Co.* v *Farrington*, 19 AD2d 555, 556; 2 Anderson, New York Zoning Law and Practice § 19.12).

The argument that there is no provision for review of the initial determination made by the Town Board of the Town of Southampton is equally without merit. Recourse is always available by way of judicial review to any party aggrieved by an adverse administrative decision.

As noted earlier, each complaint contained a claim for damages which was dismissed at Special Term. An action for damages does not lie against the Town of Southampton. A municipality is not liable in damages for enforcing an ordinance, even when such ordinance is ultimately declared to be invalid or unconstitutional (see 3 Rathkopf, Law of Zoning and Planning [3d ed.], ch. 82, 82-3 to 82-4; see, also, *McCauslan* v *City of New York*, 183 Misc 954; cf. *Rottkamp* v *Young*, 21 AD2d 373, affd. 15 NY2d 831).

Lastly, we address ourselves to Special Term's denial of Suffolk Outdoor's motion for a preliminary injunction. A preliminary injunction is a drastic form of relief requiring a showing of irreparable harm and a reasonable probability of success (see CPLR 6301; *City of Yonkers* v *Federal Sugar Refining Co.*, 207 NY 724; see, also, 7A Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 6301). A legislative enactment carries with it an exceedingly strong presumption of constitutionality (see *Matter of Malpica-Orsini*, 36 NY2d 568, 570). Sufficient basis has not been presented for such a drastic remedy. Consequently, Suffolk Outdoor is not entitled to such provisional relief.

In conclusion, we find no merit to any of plaintiffs' contentions other than the issue as to whether there is a reasonable relationship between the ordinance under challenge and the exercise of the Town of Southampton's police power in the furtherance of public safety and

welfare. As to the resolution of that issue, in view of the conflicting contentions, we hold that a trial is warranted.

HOPKINS, Acting P.J., and TITONE, J., concur.

FOOTNOTES.

[1]The plaintiffs in the second and third above-captioned actions did not cross-appeal. However, they received permission from this court to rely on the brief of Suffolk Outdoor, plaintiff in the first captioned action, in responding to the contentions of the respective defendants posited in the main appeals.

[2]Those represent Suffolk Outdoor's and Williams' respective first, second and third causes of action and Collum's and Polacek's respective first causes of action.

[3]Those represent Suffolk Outdoor's and Williams' respective fifth causes of action and Collum's and Polacek's respective second causes of action.

[4]Williams has limited its cross appeal by its brief so as to omit an argument urging the reversal of the dismissal of its fifth cause of action (for damages), and the Town of Southampton has limited its main appeal against Williams, by its brief, to omit an argument urging the dismissal of the plaintiff's sixth cause of action (for a permanent injunction), which survived that defendant's motion to dismiss.

[5]Off-premises nonaccessory billboards and signs advertise goods or services not offered for sale on the same premises as the sign.

[6]Resolution of the constitutionality of city-wide prohibition of off-premises (nonaccessory), signs has not been uniform throughout the jurisdictions. Prohibition upheld: *Murphy, Inc. v Town of Westport* (131 Conn 292); *United Adv. Corp. v Borough of Metuchen* (42 NJ 1); *United Adv. Corp. v Borough of Raritan* (11 NJ 144); *General Outdoor Adv. Co. v Department of Public Works* (289 Mass 149 [where billboard regulations extending to business districts were prohibitory in effect]); *John Donnelly & Sons* v *Outdoor Adv. Bd.* (339 NE2d 709, 720 [Sup. Ct., Mass. 1975, town by-laws effected a prohibition of nonaccessary signs by implication]); in *Donnelly (supra)* the court stated that:

> "A city-wide prohibition of billboards can also be justified on the ground that a community has a legitimate interest in improving the aesthetic quality of its business districts, as well as its residential districts. Cf. *Schloss* v *Jamison*, 262 N.C. 108, 116-117, 136 S.E. 2d 691 (1964). There is no reason why the notion of beauty should be inimical to a business area."

Prohibition unconstitutional: *Metromedia* v *City of Des Plaines* (26 Ill App 3d 942); *Norate Corp.* v *Zoning Bd. of Adjustment of Upper Moreland Twp.* (417 Pa 397); *Daikeler* v *Zoning Bd. of Adjustment of Montgomery Twp.* (275 A2d 696, 700 [Pa Commonwealth Ct. 1971]. (In *Daikeler*, the court held that where the municipal ordinance excludes billboards from an entire community, the burden of proof is upon the municipality to show that the prohibition is reasonable.) *Central Outdoor Adv. Co.* v *Village of Evendale (124 NE2d 189 [Ct. of Common Pleas, Ohio, 1954, the court held invalid the ordinance which excluded all but on-premises signs from industrial districts where a broad spectrum of uses were permitted. However, the court held that the limitation was valid in some highly restricted districts.])*.

[7]This contention has been rejected by other jurisdictions as well: *Chaster Props.* v *Preston* (176 Ohio St 425); *United Adv. Corp.* v *Borough of Raritan* (11 NJ 144); *Howard* v *State Dept. of Highways of Colorado (478 F2d 581, 584-585); Markham Advertising Co.* v *State of Washington* (73 Wash 2d 405, *en banc*, dism. for want of a Federal question, 393 US 316, rehearing den. 393 US 1112); *General Outdoor Adv. Co.* v *Department of Public Works* (289 Mass 149, app. dsmd. 297 US 725).

SHAPIRO, J. (dissenting): I respectfully dissent. I would reverse the orders appealed from and grant judgment to plaintiffs (1) declaring that the sections of Building Zone Ordinance No. 26 of the Town of Southampton which prohibit the maintenance and use of all billboards in all districts of the town and compel the removal as unlawful structures of all billboards erected in the town before June 1, 1975 are unconstitutional and void and (2) enjoining the enforcement of those provisions of the ordinance.[1]

In order to understand the constitutional issues raised it is necessary to consider the specific language of the relevant portions of the ordinance.

Section 3-50-60.07 of the ordinance provides:

> "Billboards are prohibited in all Districts, except that the Town may establish special public information centers wherein approved directional signs for businesses may be located."

Billboards are defined in section 1-30-20.68, which provides:

> "SIGN. BILLBOARD. A SIGN which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such SIGN is displayed, or only incidentally sold, offered or existing upon such lot."

Section 3-50-60.03 provides:

> "No flashing or moving signs, except time and temperature information, nor roof top signs shall be permitted in any District."

Article 3-50, which is entitled "Sign Regulations", limits the size and location of permitted signs and restricts their

purpose to professional and announcement signs, identification signs, real estate "for sale" or "for rent" signs and construction signs and temporary signs. Section 3-50-70.01, as amended July 5, 1972, provides:

> "No sign shall be erected in the unincorporated area of the Town of Southampton without first obtaining a permit from the Building Inspector and paying the required fee set forth in this Section, except that a residence name plate, street number, 'for sale', 'for rent', 'beware' or 'caution' sign not exceeding two (2) square feet accessory to a one or two family residential building shall not require such a permit."

Section 3-50-70.03 provides:

> "The Building Inspector shall determine that such proposed sign complies with all the requirements of this Ordinance and all other applicable laws and regulations of the Town of Southampton before authorizing issuance of a sign permit. Nonconforming signs shall be designated as such on the sign permit issued."

Section 3-110-70 of the ordinance is entitled "Compulsory Termination of Nonconforming Structure or Use". Subsection 3-110-70.03 thereof provides:

> "Anything to the contrary in this Ordinance notwithstanding, any nonconforming billboard or any flashing or moving sign, except as provided in Section 3-50-60.03, wherever located, shall become an unlawful structure on June 1, 1975, and shall thereupon be removed."

Subsection 3-110-70.04 provides:

> "Any owner of any such nonconforming billboard or flashing or moving sign, except as provided in

Section 3-50-60.03, who alleges that the period herein provided for amortization of such sign is unreasonable as to a particular sign may apply to the Town Board for an extension of time for amortization of such sign. If the Town Board finds that the construction cost of a particular sign would not be reasonably amortized by the aforesaid date, then the Town Board may extend the amortization period to a date which it finds would provide a reasonable amortization period. In no event however, shall the total amortization period for a particular job extend beyond a date which would result in amortization of the construction cost of a particular sign at a rate of less than $100.00 per year, computed on a 'straight line' basis."

An examination of the quoted excerpts of the Southampton Zoning Ordinance (and the other portions included in the appendix on appeal) shows that the only reference which indicates any motivation for the ordinance, other than the basic esthetic one, appears in section 3-50-60.04, which provides:

> "Illumination of signs shall be accomplished by means of shielded light sources and in such manner that no glare shall extend beyond the property lines, disturb the vision of passing motorists, or constitute hazard to traffic."

The constitutional issues in this case thus are:

1. Do the plaintiffs' complaints, which allege, *inter alia*, that the ordinance on its face violates the freedom of press provisions of the First Amendment to the Federal Constitution (made applicable to the states by the Fourteenth Amendment) fail to state a cause of action?

2. Do the plaintiffs' causes of action which allege deprivation of their property without due process of law based on the total prohibition by the ordinance of the continuance of the plaintiffs' billboard businesses within the town, without compensation for the loss of the fair market value of the businesses, other than recovery by them of their cost of construction of their billboards, state a valid claim?

I have stated the constitutional issues as I see them because I do not agree with the majority that what is involved here is a question of balancing the conflicting interests of the Town of Southampton in exercising "its police power to promote the public safety and welfare of its inhabitants with the right of the outdoor advertising industry to engage" in the billboard business. If, in fact, as I believe is the case, the plaintiffs here are deprived of their First Amendment rights to freedom of the press by this ordinance, then the test of the validity of the ordinance is not properly one of balancing their right to maintain billboard signs in the town, but rather whether the defendants can establish a compelling state interest to support their action banning in all billboards from within the geographical limits of the town (see *National Assn. for Colored People* v *Button*, 371 US 415, 438; see, also, *La Rocca* v *Lane*, 47 AD2d 243, 247, affd. 37 NY2d 575, 583; *Sherbert* v *Verner*, 374 US 398, 406, where the court, speaking of First Amendment rights said: "It is basic that no showing merely of a rational relationship to some *colorable* state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas* v *Collins*, 323 US 516, 530"). (Emphasis supplied.) The Town of Southampton's right to use its power to engage in esthetic zoning to bar *all* billboards from *all* of its extensive territory can hardly be justified as needed to avert a grave "abuse, endangering paramount interests" of the freedom of the press. Nor does the taking of such action by the town qualify as even a "colorable" state interest.

Nor can the ordinance be upheld as an exercise of the police power. Neither the majority nor the defendants set forth any basis for a finding that the barring and removal of *all* billboards from the town will promote or protect the public welfare or safety or that the continued presence of billboards in the town will endanger the public health, safety or morals.

I am compelled to the conclusion that the ordinance denies the plaintiffs their First Amendment rights of freedom of the press under the holding of our Court of Appeals in *People* v *Remeny* (40 NY2d 527). In that case, Judge WACHTLER, speaking for a majority of the court, struck down as unconstitutional a New York ordinance which provided, in relevant part:

> "No person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a frontyard or courtyard, or on any stoop, or in the vestibule of any hall in any building, or in a letter box therein" (Administrative Code of City of New York, § 755 (2)-7.0, subd. 5)

saying (pp. 529-530):

> "It is settled that an ordinance which prohibits the distribution of leaflets or handbills in all public places, at all times and under all circumstances, cannot be considered a reasonable regulation of constitutionally protected speech (see, e.g., *Lovell* v *Griffin*, 303 US 444; *Hague* v *CIO*, 307 US 496; *Schneider* v *State*, 308 US 147; *Jamison* v *Texas*, 318 US 413; *Talley* v *California*, 362 US 60)."

In his opinion, Judge WACHTLER noted that in 1942 the Supreme Court of the Untied States, in *Valentine* v

Chrestensen (316 US 52), considered the constitutionality of the New York City ordinance involved in *Remeny* and held it constitutional on the ground that *commercial speech* was not protected under the First Amendment. He then pointed out that in *Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council* (425 US 748) the Supreme Court reversed itself and held that "'commercial speech, like other varieties, is protected'" under the First Amendment. By reason thereof, Judge WACHTER concluded that (p. 530):

> "If an ordinance absolutely prohibiting all distribution of handbills containing constitutionally protected statements on political, social and religious topics is invalid, then this ordinance relating to commercial speech, now also constitutionally protected, suffers from the same infirmity."

He went on to say (p. 530):

> "The city of course has a legitimate interest in seeing that the exercise of the right does not contribute to the litter on the streets or otherwise violate the law. Thus they may enact reasonable regulations governing the time, place and circumstances of the distribution. But in our view they cannot enact an ordinance absolutely prohibiting all distribution of commercial handbills on city streets and call it a reasonable regulation of the activity. Although we sympathize with the city's desire to eliminate litter from the streets, we have concluded that the ordinance, as presently worded, is unconstitutional."

Since commercial speech now comes within the ambit of the First Amendment, billboards, just like handbills, contain constitutionally protected statements. Therefore, in

"absolutely prohibiting all" use of billboards throughout the Town of Southampton because they believe that the town, in the exercise of its power of esthetic zoning, may bar all billboards as unesthetic, the defendants have used too broad a brush.

In upholding the limited ordinance in *Matter of Cromwell* v *Ferrier* (19 NY2d 263), which regulated the size, location and number of signs allowed in each district, the Court of Appeals warned that (p. 272):

> "In concluding that the ordinance is constitutional and that the restrictive outlook of the *Bond [Matter of Mid-State Adv. Corp.* v *Bond*, 274 NY 82] case *(supra)* should no longer be followed, *it does not mean that any esthetic consideration suffices to justify prohibition.* The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those esthetic considerations which bear substantially on the economic, social, and cultural patterns of a community or district. Advertising signs and billboards, *if misplaced*, often are egregious examples of ugliness, distraction, and deterioration. They are just as much subject to reasonable controls, including prohibition, as enterprises, which emit offensive noises, odors, or debris. The eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern" (emphasis supplied).

In *People* v *Goodman* (31 NY2d 262), in which the Court of Appeals said (p. 265): "It is now settled that aesthetics is a valid subject of legislative concern and that reasonable legislation designed to promote the governmental interest

in preserving the appearance of the community represents a valid and permissible exercise of the police power", it went on to note (p. 266):

> "In assessing the reasonableness of such legislation, we may properly look to the setting of the regulating community. *(Matter of Cromwell* v *Ferrier*, 19 NY2d 263, 272, *supra)*. To be sure, not every artistic conformity or nonconformity is within the regulatory ambit of the police power. Indeed, regulation in the name of aesthetics must bear *substantially* on the economic, social and cultural patterns of the community or district." (Emphasis in original.)

There is no indication in the ordinance, nor do the defendants make any claim, that the plaintiffs' billboards "bear substantially on the economic, social and cultural patterns of the community or district", nor that the plaintiffs' billboards "are egregious examples of ugliness, distraction, and deterioration", nor that they offer "substantial" "offense to the eye", much less that *all* of them do so. There is no contention that the billboards have not been continuously maintained in good condition. Plaintiff Williams, in its brief (at p. 5) asserts, without contradiction by the defendants, and we take judicial notice of the fact, that the Town of Southampton extends "a distance of more than 25 miles" and "contains many different types of communities, rich and poor, old and new."

The above factors indicate strongly that the standards established by the *Ferrier* and *Goodman* cases for upholding esthetic zoning have not been met. The ordinance here under attack is invalid on that ground alone. But the challenge to the ordinance which is decisive is that based on the First Amendment provision guaranteeing freedom of speech and press, made applicable to the states by the Fourteenth Amendment (see *Cantwell* v *Connecticut*, 310

US 296). As the Supreme Court noted in *Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council* (425 US 748, 765, *supra*):

> "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable * * * And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal."

When the foregoing is coupled with "the test that in the First Amendment area 'government may regulate * * * only with narrow specificity' *NAACP* v *Button*, 371 US 415, 433 (1963)" (*Hynes* v *Mayor and Council of Borough of Oradell*, 425 US 610, 620), we are forced to the conclusion that the ordinance here under consideration fails to meet the requisite tests and is defective on its face. That conclusion is reinforced by the Supreme Court's declaration in *Follett* v *Town of McCormick* (321 US 573, 575), that: " 'Freedom of press, freedom of speech, freedom of religion are in a preferred position.' " Also supporting that conclusion is the statement of the Supreme Court in *National Assn. for Colored People* v *Button* (pp. 438-439):

> "the decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by the petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." (See, also, *McLaurin* v *Burnley*, 279 F. Supp. 220, 224, affd. 401 F2d 773, cert. den. 399 US 928; *Tollett* v *United States*, 485 F2d 1087, 1092.)

Thus, not only is the ordinance lacking in the "narrow specificity" required for government regulation of matters affecting the First Amendment area, since the zoning ordinance bars billboards throughout the town, but it also fails to meet the requirement that the town show "a compelling state interest" in the regulation it has imposed, which bars in its entirety, a First Amendment medium, billboards. Nor is our conclusion in any way put into question if, instead of applying the above standards, we were to use the balancing standard set forth in *Jeanette Ranking Brigade* v *Chief of Capitol Police* (342 F Supp 575, affd. 409 US 972) in which the court said (342 F Supp at pp. 584-585):

> "The cases indicate that the Supreme Court uses a balancing test, weighing the particular First Amendment rights asserted against countervailing state interests. The formula for expression which is accompanied by conduct has been perhaps best articulated in *United States* v *O'Brien*, 391 US 367, 88 S Ct 1673, 20 L Ed 2d 672 (1968), where the court held that the restrictions on expression are valid if (1) the '[regulation] furthers an important or substantial govern-

> mental interest,' (2) the 'governmental interest is unrelated to the suppression of free expression,' and (3) the incidental restriction on alleged First Amendment rights is no greater than is essential to the furtherance of that interest."

Discussing the Federal statute, which barred *all* mass demonstrations on the Capitol grounds, the court in that case said (342 F Supp at p. 585):

> "Such a prohibition is hardly in keeping with the principle that statutes
>
> 'in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ' *Carroll* v *President and Comm'rs of Princess Anne County*, 393 US 175, 183, 89 S Ct 347, 353, 21 L Ed 2d 325 (1968)."

Here the ordinance does not deal narrowly only with those billboards, if any such there be, which are in fact a *substantial* offense to the eye and are deemed to have a *material* effect on the community pattern (see *Matter of Cromwell* v *Ferrier*, 19 NY2d 263, 272, *supra*). Nor is there, nor can there be, any claim that the ban on billboards, a First Amendment medium, "furthers an important or substantial governmental interest". Nor can there be any claim that "the governmental interest is unrelated to the suppression of free expression". Hence, the ordinance must fall for failure to comply with any of the three tests set forth above. It is therefore invalid on its face and must be struck down and plaintiffs are entitled, as a matter of law, to the injunction which they seek.

The majority's effort to distinguish *Remeny* by stressing the fact that leaflets are transitory and may be rejected, whereas signs thrust their message upon passersby, is without merit. In any case, such media of communication are still aspects of free press and are therefore entitled to First Amendment protection. To extirpate the medium from a governmental area, the governmental body seeking that goal must meet the pressing state interest test. While the test may be more easily met if the medium of press expression is more obtrusive, the test must nevertheless be met. It cannot be evaded by a process of balancing which gives free rein to the exercise of individual predilections by the members of the governing body taking the action or the members of the bench ruling on the issue of constitutionality. Thus, in holding that "a trial is warranted" to determine "the issue as to whether there is a reasonable relationship between the ordinance under challenge and the exercise of the Town of Southampton's police power in the furtherance of public safety and welfare", the majority of the court, I submit, is simply not facing up to the real question involved in this appeal and is setting up a "straw" issue for determination by the trial court. There is in this record simply no basis for a contention that the issue of whether the ordinance was a reasonable exercise of the police power raises a question of fact, for the record contains no conflicting contentions of fact on that issue. The question here is solely one of law; it should not be ducked by a remand for trial.[2]

FOOTNOTES.

[1]I am aware that the only motions before the court are those of Suffolk Outdoor for a preliminary injunction and of the defendants to dismiss the complaint for failure to state a cause of action and failure to exhaust administrative remedies. However, the parties have addressed themselves to the merits and have thereby charted their course in such a manner as to permit this court to resolve the issues on their merits. The majority is in accord with this view.

[2]There is no merit to respondents' contention that plaintiffs were required to exhaust their administrative remedies before resorting to this court action, since they are claiming that the ordinance is unconstitutional insofar as it violates their First Amendment freedoms (see *Matter of Cohen* v *D'Elia*, ____ AD2d ____ [2d Dept., dec. Dec. 13, 1976]; *Lesron Junior* v *Feinberg*, 13 AD2d 90, 94).

SUOZZI, J. (dissenting). I dissent from the majority's holding which mandates a trial to determine "whether there is a reasonable relationship between the ordinance under challenge and the exercise of the Town of Southampton's police power in the furtherance of public safety and welfare", and would dismiss those portions of the complaints which allege such a violation. I also dissent from the majority's holding which, in effect, dismisses those portions of the plaintiffs' causes of action which allege a violation of their First Amendment rights, since I concur with the conclusion of Mr. Justice SHAPIRO that the ordinance herein represents an unconstitutional abridgment of the plaintiffs' First Amendments rights under the authority of *People* v *Remeny* (40 NY2d 527). I agree with him that billboards represent a form of commercial speech, a mode of communication, which was recently given protection under the First Amendment by the Supreme Court of the United States in *Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council* (425 US 748). Since the *Virginia* case was decided nine years after *Matter of Cromwell* v *Ferrier* (19 NY2d 263), it is clear that the issue of First Amendment rights was never considered by the Court of Appeals in *Cromwell* and that *Cromwell* is not controlling on this issue.

Except for the determination of our Court of Appeals in *Matter of Cromwell* v *Ferrier (supra)*, I would have no hesitancy in declaring that the ordinance herein is confiscatory and not related to the police power. The majority relies on *Cromwell* to support its holding that plaintiffs' theory which alleges that the ordinance is confiscatory and unrelated to the police power, is a "viable" one, the resolution of which must await the outcome of a full trial.

My reading of *Cromwell (supra)* does not support a conclusion that a trial is necessary on the police power theory. Rather, it supports, I believe, my conclusion that the por-

tions of the complaints which allege an invalid exercise of the police power should have been dismissed.

In dealing with what the majority concedes is the "very" issue involved herein, the Court of Appeals in *Cromwell* upheld, as a valid exercise of the police power, an ordinance implicitly banning all nonaccessory signs throughout the Town of Wallkill and dismissed the petition therein.

A reading of the *Cromwell* decision, as well as the record and briefs filed therein, indicates that the ordinance therein, insofar as it banned the erection of nonaccessory signs throughout the town, was virtually identical to the ordinance involved at bar. Although the court in *Cromwell* noted that not all regulations based on aesthetic considerations would suffice to justify the prohibition of a legitimate business, but only regulations based on aesthetic considerations which (p. 272) "bear substantially on the economic, social, and cultural patterns of a community or district", the fact remains that in *Cromwell*, when faced with this particular constitutional attack on an ordinance very similar to the one at bar, the court dismissed the petition and did not remand for a trial.

Clearly, if *Cromwell* is the controlling precedent herein, as the majority holds, there would be no factual issues to be tried, and the petition would have to be dismissed. By holding that a trial is necessary in order to resolve the issues raised in the police power claim, the majority thereby precludes an accelerated review by our Court of Appeals of what, I believe, is solely an issue of law. At the same time, this holding effectively imposes upon the plaintiffs the onerous and unnecessary burden of overcoming, at a trial, the presumption of constitutionality which attaches to this ordinance.

I am constrained to file this separate dissenting opinion only because I do not agree with Mr. Justice SHAPIRO's suggestion that the ordinance involved here is so different

from that in *Cromwell* as to remove it from the controlling effect of *Cromwell* on the issue of confiscation and the reasonable exercise of the town's police power. Admittedly, the ordinance in *Cromwell* did not provide, as does the ordinance here, for the eventual elimination of *all* existing billboards in the town in addition to banning all new nonaccessory signs. However, that difference is insignificant in light of the holding of the Court of Appeals in *Matter of Harbison* v *City of Buffalo* (4 NY2d 553), that prior nonconforming uses may be eliminated through amortization over a reasonable period of time.

Accordingly, I concur in the conclusion reached by Mr. Justice SHAPIRO in his dissenting opinion with regard to the free speech and press claims, but not as to the police power claims.

APPENDIX C

SUPREME COURT, SUFFOLK COUNTY
SUFFOLK OUTDOOR ADVERTISING CO., INC.,

Plaintiff,

VS.

THEODORE O. HULSE, RICHARD A. NIGRO, WILLIAM F. McCOY, NORMAN T. PENNEY, THEODORE R. ALPERT, etc.,

Defendants.

SPECIAL TERM PART I
BY BRACKEN, J.S.C.
DATED March 30, 1976

MOTION NO: 9097
September 10, 1975
Index No. 7775/75

VS.

TOWN BOARD OF THE TOWN OF SOUTHAMPTON,

Defendant.

MOTION NO: 9095
Index No. 8578/75

FRANK J. POLACEK, JR., d/b/a BEHRLE OUTDOOR ADVERTISING,

Plantiff,

VS.

TOWN BOARD OF THE TOWN OF SOUTHAMPTON,

Defendant.

MOTION NO: 9096
Index No. 8579/75

* * *

Motion No. 9097, by the defendant, to reargue and renew the defendant's cross-motion to dismiss the complaint of Suffolk Outdoor Advertising Co., Inc., and every cause of action alleged in the complaint, which cross-motion was denied by the decision of the Court dated June 10, 1975, on which no order has been entered, is granted.

This Court incorporates herein its decision dated June 19, 1975, and its interim decision order dated December 5, 1975;

Building Zone Ordinance No. 26 of the Town of Southampton, effective May 2, 1972, requires the removal

of all non-accessory billboard by June, 1975, and further provides for an application by the owner of such billboards to the Town Board of the Town of Southampton for an extension of time to amortize the construction costs thereof and to continue the otherwise compulsory termination of such non-conforming structure or use. The thrust of the defendant's present motion is that:

(1) The ordinance is non unconstitutional on its face;
(2) the plaintiff has failed to exhaust available administrative remedies;
(3) the subject of the ordinance has not been pre-empted by Section 131 of Title 23, U.S.C. or New York Highway Law §88.

The parties are now apparently in agreement as to which of the plaintiff's signs are located contiguous to the Federal Aid primary roads, within the purview of such statutes.

The ordinance prohibits non-accessory signs in the *entire* Township of Southampton and makes no provision for compensation for signs located contiguous to the Federal Aid primary roads located within the Town. There is no issue presented as to the power of the defendant to control or prohibit non-accessory signs not in existence at the time of the enactment of the ordinance under its police power, in concert with aesthetic considerations, *Cromwell v. Ferrier, 19 N.Y. 2d 263, 279 N.Y.S. 2d 22.*

Rochester Poster Advertising Co. v. Town of Brighton, 79 Misc. 2d 446, 357 N.Y.S. 2d 346, reversed ____ A.D. 2d ____ (Fourth Department), 374 N.Y.S.2d 510, dealt with an ordinance requiring compulsory termination of billboards in the entire Town of Brighton, wherein no provision was made for extending the amortization period. The plaintiff in *Rochester* was the owner of real property leased for billboard purposes wherein a four panel billboard was erected many years prior to the enactment of the ordinance, which ordinance permitted the continuation of the

billboard for three years after the effective date of the ordinance. Based on a determination of the factual issues, the Appellate Division, Fourth Department, held the ordinance constitutional and valid, as providing a reasonable period of amortization of the plaintiff's investment.

None of the Appellate Court decisions made a determination that any local ordinance which totally excludes non-accessory billboards within an entire town is *constitutional.* The preamble to the Appellate Division decision in *Rochester, supra, stated:*

> "Although several amicus briefs have been submitted addressing themselves to the question of the constitutionality of local ordinances which totally exclude billboards from a regulated area, we do not believe that this case requires or that the record presents a sufficient showing for us to reach that broad issue." [at page 510]

See Also, Cromwell v. Ferrier, supra, at page 272.

This is in fact the broad issue presented by the plaintiff in this complaint.

It was for this reason that this Court, in its memorandum decision dated June 17, 1975, concluded that in this particular case it was not inconsistent to permit the continuance of this action and at the same time suggest that the plaintiff petition the defendant for an extension of the amortization period pursuant to Ordinance §3-110-70.04 of the Town of Southampton. Under the facts of this particular case, this Court is satisfied that the plaintiff is not obligated to exhaust "available administrative remedies" in this action for a declaratory judgment, which also seeks ancillary injunctive relief.

This Court has reviewed the plaintiff's amended complaint and plaintiff's Fourth and Fifth Causes of Action are dismissed as a matter of law. The Fourth Cause of Action is

partly repetitive of the First, Second and Third Causes of Action and the alleged arbitrary mandatory prohibition of billboards not located contiguous to a Federal Aid primary road as set forth in the *Fourth* Cause of Action, when compared to the requirement of the Federal and State Statutes to compensate for removal of billboards, does not state a cause of action. The *Fifth* Cause of Action seeking damages against the defendant for the threatened enforcement of an allegedly unconstitutional or void ordinance does not state a cause of action, *Rottkamp v. Young, 21 A.D. 2d 373, 249 N.Y.S. 2d 333, aff'd. 15 N.Y. 2d 831, 251 N.Y.S. 2d 944.*

As a legitimate exercise of police power for the protection of public safety, a sign and zoning ordinance does not, *per se,* run afoul of the due process and just compensation clauses of the Constitution, *Goldblatt v. Hempstead, 369 U.S. 590, 82 S. Ct., 987, 8 L.Ed. 2d 130,* cited in *Rochester, supra.* The presumption of constitutionality (*Matter of Malpica v. Orsini, 36 N.Y. 2d 568, 570, 370 N.Y.S. 2d 511, 514*) cannot override the necessity of determining what this Court considers factual issues which require a plenary trial. The validity of the Southampton sign ordinance is dependent upon the *totality of circumstances* and the plaintiff is entitled to an opportunity to present evidence as to the prevailing circumstances and conditions in a trial of this action, *Ilasi v. City of Long Beach, _____ N.Y. 2d _____, N.Y. Court of Appeals, decision January 8, 1976, N.Y. Law Journal, January 28, 1976, page 1, col. 6.*

In conclusion, a trial of all the issues must be had in order that a meaningful determination be made which is capable of review upon appeal, *Ilasi v. City of Long Beach, supra.* Such trial should include, but not be limited to:

> (1) The constitutionality of this ordinance prohibiting all non-accessory signs (billboards) within the entire Township, *Rochester Poster Advertising Co., Inc. v. Town of Penfield, ____ A.D.*

2d ____, (Appellate Division, Fourth Department) 380 N.Y.S. 2d 153;

(2) The claim of pre-emption as to billboards located contiguous to Federal Aid primary roads.

This Court is also persuaded that the plaintiff need not exhaust the available administrative remedies by application pursuant to §3-110-7.404 for an extension of the amortization period. Upon reargument and renewal, the defendant's cross-motion to dismiss the complaint and every cause of action as alleged in the complaint is granted with respect to plaintiff's Fourth and Fifth Causes of Action and is otherwise *denied.*

The plaintiff is directed to file and serve the amended complaint, as annexed to the affidavit in opposition to this motion for reargument and renewal and, as modified by this decision, deleting therefrom the Fourth and Fifth Causes of Action.

For the reasons hereinbefore set forth, the defendant's motion No. 9095, Collum Signs, Inc. v. Town of Southampton, upon reargument, is granted to the extent that the Second Cause of Action of the complaint, which seeks money damages, is dismissed, and said motion is otherwise denied.

For the reasons set forth hereinbefore, the defendant's motion No. 9096, Frank Polacek, Jr., v. Town of Southampton, upon reargument, is granted to the extent that the plaintiff's Second Cause of Action for money damages is dismissed, and said motion is otherwise denied.

After issue is joined in these actions and a companion action, H.C. Williams Co., Inc. v. Town of Southampton, Index No. 75/12638, any or all parties may be disposed to move for a joint trial of all actions.

This shall constitute the order to be entered herein.

/s/ Laurence J. Bracken
J.S.C.

SUPREME COURT, SUFFOLK COUNTY — PART I

SUFFOLK OUTDOOR ADVERTISING CO., INC.,

Plaintiff,

vs.

THEODORE O. HULSE, RICHARD A. NIGRO, WILLIAM F. McCOY, NORMAN T. PENNEY, THEODORE R. ALPERT, etc.

Defendants.

SPECIAL TERM
By BRACKEN, J.S.C.
DATED December 5, 1975

Motion No. 9097
Date: September 10, 1975
Index No. 7775

* * *

The defendants, by Motion No. 9097, referred to this Court September 16, 1975, move to reargue a previous motion wherein this Court, by its decision dated June 19, 1975, denied the defendants' cross-motion for judgment dismissing the complaint and every cause of action alleged in the complaint. *No order* has been entered in the decision dated June 19, 1975.

Based on the submissions made to date, this Court will also view this motion as a renewal motion since no documentation was previously submitted which located the individual billboards (outdoor advertising structures) in relation to Highways in the Federal-Aide Interstate System and Primary Highway System, *U.S.C. Title 23, §131; New York State Highway Law, §§ 88(1)(a)(b); 341 (49).*

The parties, for purpose of this motion, are in agreement as to such locations. This Court is uncertain as to locations, notwithstanding the parties agreement as to such locations.

This Court's decision dated June 19, 1975, denied plaintiff's motion for a preliminary injunction and the defendants were stayed from enforcement of the Sign Ordinance against the plaintiff for a period of thirty days from entry of the order to be entered, thus giving the plaintiff an opportunity to submit an application to the Town Board of

Southampton, pursuant to Ordinance §3-110-70.04, for an extension of the amortization period.

The attorney for the plaintiff has submitted to this Court a letter dated December 2, 1975 with an annexed affidavit in further opposition to the defendants' motion referred to this Court September 16, 1975.

The plaintiff is directed to submit a supplemental affidavit to this Court within ten days after receipt of this interim Order, setting forth the status of its application pursuant to Ordinance §3-110-70.04, *supra*, and steps taken, if any, by the plaintiff after receipt of the letter dated September 18, 1975 from the defendants' attorney.

Based on the representation of the defendants in this action to withhold enforcement of the Ordinance, the motions pending in the following enumerated actions shall be held in abeyance pending receipt of the supplemental affidavit directed to be furnished to this Court, supra:

(1) Collum Signs, Inc. v. Town Board of the Town of Southampton, Index No. 75/8578 (Motion No. 9095—reargue)

(2) Frank J. Polacek, Jr. d/b/a Behrle Outdoor Advertising v. Town Board of Southampton, Index No. 75/8579 (Motion No. 9096 — reargue)

(3) The H.C. Williams Co., Inc., v. Town of Southampton, Index No. 75/12638 (Motion No. 9094 — dismiss complaint)

This shall constitute the interim order to be entered herein with respect to each action herein noted.

/s/ Laurence J. Bracken
J.S.C.

SUPREME COURT, SUFFOLK COUNTY — PART I
SPECIAL TERM
By BRACKEN, J.S.C.
DATED June 19, 1975

SUFFOLK OUTDOOR ADVERTISING CO., INC.

Plaintiff,

vs.

THEODORE O. HULSE, et al, Town Board of the Town of Southampton,

Defendants.

* * *

The complaint in this action alleges that the plaintiff holds leaseholds or easements upon 37 separate parcels in the Town of Southampton and erected and situated on each parcel by the plaintiff or its predecessor in interest is a *billboard* (outdoor advertising structure) erected prior to the adoption of the Building Zone Ordinance No. 26 of the Town of Southampton by the Southampton Town Board May 2, 1972.

The Building Zone Ordinance prohibits billboards, *Section 3-50-60.07;* provides for compulsory termination of certain non-conforming structures or uses, *Section 3-110-70.01, et seq;* requires the removal of billboards on or before June 1, 1975, *Section 3-110-70.03,* and makes provision for application by the owner of a non-conforming billboard to the Town Board for an extension of the amortization period (thus permitting beyond June 1, 1975 the continued non-conforming structure and use), *Section 3-110-70.04.* The following quoted language is the last sentence of Section 3-110-70.04:

> "In no event, shall the total amortization period for a particular job extend beyond a date which would result in amortization of the construction cost of a particular sign at a rate of less than $100.00 per year, computed on a "straight line" basis."

The complaint alleges that the Ordinance is unconstitutional and void, arbitrary, discriminatory, unreasonable and confiscatory, and seeks a declaratory judgment to that end and further, as applied to the plaintiff, the Ordinance is unconstitutional, void, arbitrary, discriminatory and confiscatory and finally, paragraph 28 of the complaint assesses plaintiff's loss at $7,000,000.00 in the event the defendant enforces the Ordinance.

This action was commenced on May 23, 1975 and by Order to Show Cause granted May 23, 1975, the plaintiff seeks a preliminary injunction, enjoining and restraining the defendants from enforcement of the Ordinance.

The defendants have not answered the complaint and have cross-moved for a judgment dismissing the complaint on the grounds that:

(1) The complaint fails to state a cause of action;
(2) plaintiff has failed to exhaust its adminstrative remedies;
(3) improper parties defendants are named in the complaint; the Town of Southampton is not a named defendant.

The plaintiff's oral argument of this motion on May 28, 1975 emphasized that the Ordinance of the Town of Southampton is in contravention of the Federal Highway Beautification Act of 1965 (*Sec. 131 of Title 23, United States Code)* and of New York Highway Law Section 88. Paragraph Fourteenth of the plaintiff's complaint alleges the Ordinance is preempted by statutes of the State of New York and of the United States, without detailing specific references. Paragraph Tenth of plaintiff's complaint alleges that said structures are adjacent to travel-thoroughfares in the Town of Southampton. The affidavit in support of plaintiff's motion for a preliminary injunction is silent with respect to Federal and State Law, *supra*, which is applicable to lands contiguous to highways in the Federal-Aid

Interstate System and Primary Highway System (*Highway Law, §88(1)(a)(b)).*

The parties apparently agree that the stretch of Sunrise Highway in the Town of Southampton contiguous to which were located plaintiff's billboards, is not a part of the Federal-Aid Interstate System; the parties, however, are in sharp dispute as to whether or not this stretch of Sunrise Highway is a part of the Primary Highway System. *Highway Law, Section 341(49)* designates the following portion of Sunrise Highway as a state highway:

> "Sunrise highway extension, beginning at the Suffolk-Nassau county line at the terminus of state highway eight thousand four hundred seventy-four in or near the village of Amityville, thence running generally easterly through or near the village of Patchogue, the hamlets of Moriches, Eastport, Hampton Bays, Tuckahoe, and Hardscrabble to state highway nine thousand three hundred five in or near the hamlet of Promised Land;"

It thus appears that the stretch of Sunrise Highway in the Town of Southampton is a State Highway.

Highway Law, Section 88 (1) (b) — Control of Outdoor Advertising, includes the following definition as used in said section:

> "(b) "Primary highway system" means that portion of connected main highways, as officially designated, or as may hereafter be so designated, by the commissioner of transportation, and approved by the secretary of commerce or the secretary of transportation of the United States pursuant to the provisions of title twenty-three of the United States code, as amended."

It would appear that a primary highway system, as defined in Section 88(1)(b) must of necessity be a State Highway as defined in Section 341 (4a), since the State of New York does not control Town Roads. *cf. §88(9):*

> "Nothing in this section shall be construed to abrogate or affect the provisions of any other statute, lawful ordinance, regulation pursuant thereto or resolution which are more restrictive than the provisions of this section or the agreement ratified and approved by this section."

This Court has reviewed the letter dated June 4, 1975 from defendants' counsel, which states in part:

> "The New York State Transportation Department has informed the Town of Southampton by telephone that the only highway in the Town of Southampton, which is in the federal-aid primary system, is Sunrise Highway from the Town of Brookhaven line easterly to its present terminus in Shinnecock Hills. None of the plaintiff's signs, as shown by the locations thereof on Exhibit A annexed to the complaint are located along such portion of Sunrise Highway."

The importance of this issue is that the Federal and State laws require and direct that compensation be paid by the State in the same manner as other property in the event the Commissioner of Transportation of the State of New York directs the removal of billboards along a primary highway. The Southampton Town Ordinance makes no provision for payment of compensation.

Whereas this Court might assume that all primary highway systems are designated state highways, this Court cannot assume that all state highways are part of a primary highway system *(Highway Law, §88(1)(b); 341(49), supra).*

Independent of the applicability of the Federal and State

legislation, which this Court cannot resolve by a study of the papers submitted, the plaintiff's position is that the Ordinance is unconstitutional and confiscatory, *Rochester Poster Adv. Co. v. Town of Brighton, 78 Misc. 2d 446, 357 N.Y.S. 2d 346.* In *Rochester,* the Zoning Ordinance made no provision for extending the amortization period, which amortization period was limited to three years (*cf. Southampton Ordinance §3-110-70.04, supra).* Ordinances similar to the Southampton Ordinance have been upheld by the Courts of this state, *People v. Stover, 12 N.Y. 2d 442, 240 N.Y.S. 2d 734; Cromwell v. Ferrier. 19 N.Y. 2d 265, 279 N.Y.S. 2d 22.*

This Court does not find the plaintiff guilty of laches or "unclean hands". This Court does find that the plaintiff has failed to show clear right to the relief of a preliminary injunction in the papers submitted to this Court.

Plaintiff's motion for a preliminary injunction is denied, and the plaintiff may submit an application to the Town Board of the Town of Southampton, pursuant to Ordinance §3-110-70.04, for an extension of the amortization period, if the plaintiff is so disposed. In the discretion of this Court, the defendants are stayed from enforcement of the Ordinance against the plaintiff herein for a period of thirty days after entry of the Order herein.

The defendants' cross-motion for an Order dismissing the complaint is denied.

In this particular case, this Court does not find it inconsistent to permit the continuance of this action and at the same time suggest to the plaintiff that it petition the Southampton Town Board for an extension of the amortization period. It further appears that the plaintiff may amend, its complaint as a matter of right, if it is so disposed.

Settle Order.

Laurence J. Bracken
J.S.C.

APPENDIX D

Remittitur
COURT OF APPEALS
STATE OF NEW YORK
The Hon. Charles D. Breitel, Chief Judge, Presiding
2 No. 545
The Suffolk Outdoor Advertising
Co., Inc., Respondent-Appellant,
vs.
Theodore O. Hulse, &ors., constituting the Town Board of the
Town of Southampton,
Appellants-Respondents.

Collum Signs, Inc.,
vs.
Town Board of the Town of
Southampton,

Frank J. Polecek, Jr., d.b.a.
Behrle Outdoor Advertising,
vs.
Town Board of the Town of
Southampton, Respondents.

* * *

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to defendants, in accordance with the opinion herein and, as modified, affirmed. Question certified answered in the negative. Opinion by Jasen, J. All concur except Fuchsberg, J., who dissents and votes to reverse and declare the ordinance unconstitutional in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw
Deputy Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1977.

APPENDIX E

3 Mo. No. 144
Modjeska Sign Studios, Inc.,
Appellant,
vs.
Peter A.A. Berle, Individually and as Commissioner &c.,
Respondent.

& 3 other actions:
Suffolk Outdoor Advertising Co., Inc. v. Hulse.
Collum Signs, Inc. v. Town Board Town of Southampton.
Frank J. Polacek, Jr. v. Town Board Town of Southampton.

Motion by Modjeska Sign Studios, Inc. and Suffolk Outdoor Advertising Co., Inc. for reargument of the appeals and for stays or, in the alternative, to amend the remittiturs herein denied with twenty dollars costs and necessary reproduction disbursements.

Decision Court of Appeals Feb. 22, 1978.

APPENDIX F

COURT OF APPEALS OF THE STATE OF NEW YORK

Case #545

Index No. 75-7775

SUFFOLK OUTDOOR ADVERTISING CO., INC.,

Plaintiff-Respondent,

-against-

THEODORE O. HULSE, RICHARD A. NIGRO, WILLIAM F. McCOY, NORMAN T. PENNEY, THEODORE R. ALPERT, constituting the Town Board of the Town of Southampton,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that SUFFOLK OUTDOOR ADVERTISING CO., INC., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment and order of the Court of Appeals of the State of New York dated December 21, 1977, together with the decision of the Court of Appeals denying reargument in said action dated February 22, 1978.

This appeal is taken pursuant to 28 U.S.C.S. 1257(2).

Dated: May 11, 1978.

HANCOCK, ESTABROOK, RYAN,
SHOVE & HUST
Carl W. Peterson, Jr., of Counsel
Co-Counsel for plaintiff Suffolk
Outdoor Advertising Co., Inc.
One Mony Plaza
Syracuse, New York 13202
Tel. No. (315) 471-3151

EUGENE L. DeNICOLA, ESQ.
Co-counsel for plaintiff Suffolk
Outdoor Advertising Co., Inc.
24 Railroad Avenue
Sayville, New York 11782
Tel. No. (516) 567-1200

STATE OF NEW YORK
SUPREME COURT COUNTY OF SUFFOLK

Index No. 75-7775

SUFFOLK OUTDOOR ADVERTISING CO., INC.,

Plaintiff-Respondent,

-against-

THEODORE O. HULSE, RICHARD A. NIGRO, WILLIAM F. McCOY, NORMAN T. PENNEY, THEODORE R. ALPERT, constituting the Town Board of the Town of Southampton,

Defendants-Appellants.

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EUGENE L. DeNICOLA, ESQ.
Co-counsel for plaintiff Suffolk
Outdoor Advertising Co., Inc.,
24 Railroad Avenue
Sayville, New York 11782
Tel. No. (516) 567-1200

APPENDIX G

EXCERPTS FROM TOWN OF SOUTHAMPTON ZONING ORDINANCE

Definitions:

1-30-20.67
SIGN. Any kind of billboard, sign-board, pennant, or other shape or device or display, used as an advertisement, announcement, or direction, including any text, symbol, lights, marks, letters or figures painted thereon or painted on or incorporated in the composition of an exterior facing of a building or structure.

1-30-20.68
SIGN, BILLBOARD. A SIGN which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such SIGN is displayed, or only incidentally sold, offered or existing upon such lot.

1-30-20.69
SIGN, IDENTIFICATION. A SIGN which directs attention to a business or profession conducted upon the property.

1-30-20.70
SIGN, PROFESSIONAL or ANNOUNCEMENT. A temporary or permanent sign which directs attention to a resident's home, a home occupation, a home professional office, or a public or semi-public building.

1-30-20.71
SIGN, REAL ESTATE or CONSTRUCTION. A Sign advertising land or improvements thereto, or describing construction activity or a firm doing work related to construction on the premises on which the sign is located.

1-30-20.72

SIGN, TEMPORARY. A temporary Sign which directs attention to a special activity or entertainment or one which indicates the location of a real estate subdivision.

3-50 SIGN REGULATIONS

3-50-10

Schedule of Permitted Signs

The following schedule or permitted signs shall apply, according to the District in which the lot is located on the Zoning Map, whether such lot be used for a permitted use or for a special exception use.

PERMITTED SIGNS				
Type of District	Professional and Announcement Signs	Identification Signs	Real Estate "For Sale" or "For Rent" Signs, and Construction Signs	Temporary Signs
All Residence Districts	One (1) on each public street frontage, pursuant to Sec. 3-50-20	Prohibited	One (1) on each public street frontage for single lots or buildings: two (2) subdivision signs on each public street frontage for each approved subdivision pursuant to Sec. 3-50-50	Pursuant to Sec. 3-50-50.02
Village and Highway Business Districts	One (1) on each public street frontage, pursuant to Sec. 3-50-20	One (1) wall sign on each public street or municipal off-street parking lot, and one (1) detached or ground sign pursuant to Sec. 3-50-30	One (1) on each public street frontage for single lots or buildings pursuant to Sec. 3-50-50	Pursuant to Section 3-50-50.02
All Other Districts	Prohibited	One (1) wall sign on each public street or municipal offstreet parking lot, and one (1) detached or ground sign pursuant to Sec. 3-50-40	One (1) on each public street frontage for single lots or buildings pursuant to Sec. 3-50-50	Pursuant to Section 3-50-50.02

3-50-20

Professional Signs and Announcement Signs

3-50-20.01

A professional sign or an announcement sign for a home

professional office or home occupation shall bear only the name and profession or occupation of the resident. Such signs shall have a maximum area of two (2) square feet and may be located on the building wall or in the required front yard, provided that it is set back at least ten (10) feet from all property lines and is not more than six (6) feet above the natural ground level at its location.

3-50-20.02

A church or other place of worship may have one (1) announcement sign, not over 18 square feet in area, on each public street frontage of its property, either fixed on the main wall of the building or located in the required front yard, provided that it is set back at least twenty (20) feet from the front property line and at least twenty-five (25) feet from all other property lines.

3-50-20.03

A parish house, club, school, or public or semi-public building may have one (1) announcement sign, not over six (6) square feet in area, on each public street frontage of its property, either fixed on the main wall of the building or located in the required front yard, provided that it is set back at least twenty (20) feet from the front property line and at least twenty-five (25) feet from all other property lines.

3-50-20.04

Such signs may be double-faced.

3-50-20.05

Such signs may be lighted only by shielded light sources attached to the sign of any intensity not exceeding fifteen (15) watts of power.

3-50-30

Village and Highway Business District Identification Signs

3-50-30.01

A wall identification sign shall be attached to or in-

corporated in a building wall. Such sign shall not:

(a) Exceed in total area two (2) square feet for each horizontal foot of such wall on which it is mounted.

(b) Exceed in width 75 percent of the horizontal measurement of the wall on which it is mounted.

(c) Project more than one (1) foot from such wall.

3-50-30.02

A detached or ground identification sign may only be erected where the building is set back from the street line a distance of 40 feet or more. Such sign shall not:

(a) Exceed in total area 40 square feet.

(b) Exceed 18 feet in height measured from the ground level.

(c) Have less than four (4) feet of clear space between the ground level and the bottom of the sign board, provided that necessary supports may extend through such clear space.

(d) Be set back less than 20 feet from any property line, except that if the average front set back of existing buildings within the same block is less than 10 feet, then the average set back so established shall be applied to such sign.

3-50-40
All Other Nonresidential District Identification Signs

3-50-40.01

A wall identification sign shall be attached to or incorporated in a building wall. Such sign shall not:

(a) Exceed in total area one (1) square foot for each horizontal foot of such wall on which it is mounted.

(b) Exceed in width 75 percent of the horizontal measurement of the wall on which it is mounted.

(c) Project more than one (1) foot from such wall.

3-50-40.02

A detached or ground identification sign may only be erected where the building is set back from the street line a

distance of 40 feet or more. Such sign shall not:

(a) Exceed in total area 40 square feet, and

(b) Exceed 18 feet in height measured from the ground level.

(c) Have less than four (4) feet of clear space between the ground level and the bottom of the sign board, provided that necessary supports may extend through such clear space.

(d) Be set back less than 20 feet from any property line, except that if the average front set back of existing buildings within the same block is less than 10 feet, then the average set back so established shall be applied to such sign.

3-50-50
Real Estate and Construction Signs

3-50-50.01

Real estate and construction signs shall be set back at least 20 feet from any property line. Such signs shall have a maximum area of four (4) square feet, except that subdivision signs shall have a maximum area of 24 square feet. Such signs shall not be illuminated in any Residence District.

3-50-50.02

Temporary directional signs indicating the location of a real estate subdivision shall be permitted as variances, under the provision of Section 5-50-80 for a period one (1) year during the active selling of subdivision properties. Additional periods of one (1) year shall be the subject of applications to the Board of Appeals.

3-50-60
General Provisions

3-50-60.01

The area of a sign shall be determined by the smallest rectangle that encompasses all of the letters or symbols that

makeup the sign together with the area of any background of a different color or material than the general finish of the building, whether painted or applied.

3-50-60.02

The outlining by direct illumination of all or part of a building such as a gable, roof, wall, side or corner is prohibited, except during the Christmas season.

3-50-60.03

No flashing or moving signs, except time and temperature information, nor roof top signs shall be permitted in any District.

3-50-60.04

Illumination of signs shall be accomplished by means of shielded light sources and in such a manner that no glare shall extend beyond the property lines, disturb the vision of passing motorists, or constitute hazard to traffic.

3-50-60.05

Temporary or permanent signs resting on, or attached to vehicles, shall not be used as a means to circumvent the provisions of this Ordinance.

3-50-60.06

No sign shall be so located as to detract from or obstruct historical buildings from public view.

3-50-60.07

Billboards are prohibited in all Districts, except that the Town may establish special public information centers wherein approved directional signs for businesses may be located.

3-50-60.08

Nothing contained in this Ordinance shall be construed to prohibit the Town or any other governmental agency from erecting and maintaining public signs deemed to be necessary in the public interest.

3-50-60.09

All non-public signs, except for residence name plates and street number signs not exceeding two (2) square feet that are accessory to one and two family residence buildings, shall have an approved sign permit and permit number issued by the Town.

3-50-70

Procedures, Permits and Fees

3-50-70.01

No sign shall be erected in the unincorporated area of the Town of Southampton without first obtaining a permit from the Building Inspector and paying the required fee set forth in this Section, except that residence name plates and street number signs not exceeding two (2) square feet accessory to one and two-family residential buildings shall not require such a permit.

3-50-70.02

Applications for sign permits shall be made upon forms provided by the Building Inspector and shall include plans, specifications and other such information as the Building Inspector may require.

3-50-70.03

The Building Inspector shall determine that such proposed sign complies with all the requirements of this Ordinance and all other applicable laws and regulations of the Town of Southampton before authorizing issuance of a sign permit. Nonconforming signs shall be designated as such on the sign permit issued.

3-50-70.04

No sign permit shall be issued prior to payment of a fee of twenty-five (25) cents per square foot of sign area, but in no event less than fifteen ($15) dollars.

3-50-70.05

Each sign permit issued shall be assigned a permit num-

ber that shall be prominently and permanently displayed on the face of such sign. Failure to so display such permit number shall constitute cause for revocation of the sign permit by the Building Inspector.

3-50-70.06

Each sign for which a sign permit has been issued shall be inspected for adequate maintenance, freedom from any hazardous condition and structural soundness each year. If found to be satisfactory, the Building Inspector shall renew the sign permit for a period of one (1) year on payment of an inspection fee of fifty (50) cents per square foot of sign area, but in no event less than a minimum of fifteen ($15) dollars.

3-50-70.07

No existing sign shall be structurally altered, rebuilt, enlarged, extended, relocated or modified in any way except in conformity with the provisions of this Section.

3-110-70

Compulsory Termination of Noncomforming Structure or Use

3-110-70.01

A NONCONFORMING STRUCTURE or NONCONFORMING USE may be subject to compulsory termination by the Town Board when it is found detrimental to the conservation of the value of the surrounding land and improvements, or to future development of surrounding lands, and therefore is tending to deteriorate or blight the neighborhood.

3-110-70.02

In ordering the compulsory termination of a nonconforming structure or nonconforming use, the Town Board shall establish a definite and reasonable amortization period during which the nonconforming use may continue while the investment value remaining after the date of the termination order is amortized. Determination of the amount to be amortized shall be based on the value

and condition of the land and improvements for the nonconforming use less their value and condition for a conforming use, and such other reasonable costs as the termination may cause. The rate of amortization shall be in accordance with reasonable economic practice.

3-110-70.03

Anything to the contrary in this Ordinance notwithstanding, any nonconforming billboard or any flashing or moving sign, except as provided in Section 3-50-60.03, wherever located, shall become an unlawful structure on June 1, 1975, and shall thereupon be removed.

3-110-70.04

Any owner of any such nonconforming billboard or flashing or moving sign, except as provided in Section 3-50-60.03, who alleges that the period herein provided for amortization of such sign is unreasonable as to a particular sign may apply to the Town Board for an extension of time for amortization of such sign. If the Town Board finds that the construction cost of a particular sign would not be reasonably amortized by the aforesaid date, then the Town Board may extend the amortization period to a date which it finds would provide a reasonable amortization period. In no event however, shall the total amortization period for a particular job extend beyond a date which would result in amortization of the construction cost of a particular sign at a rate of less than $100.00 per year, computed on a "straight line" basis.

7/5/1972

TAKE NOTICE that at the regular meeting of the Town Board held on July 5, 1972 at the Town Hall, Southampton. New York Building Zone Ordinance No. 26 was amended as follows:

IN RELATION TO SIGNS

Delete 3-50-60.09

Amend 3-50-70.01 to read as follows:

No sign shall be erected in the unincorporated area of the Town of Southampton without first obtaining a permit from the Building Inspector and paying the required fee set forth in this Section, except that a residence name plate, street number, "for sale", "for rent", "beware" or "caution" sign not exceeding two (2) square feet accessory to a one or two family residential building shall not require such a permit.

Amend 3-50-70.04 to read as follows:

No sign permit shall be issued prior to payment of a fee of twenty-five (25) cents per square foot of sign area, but in no event shall such fee be less than two (2) dollars.

Amend 3-50-70.06 to read as follows:

Each sign for which a sign permit has been issued may be inspected for adequate maintenance, freedom from any hazardous condition and structural soundness. If such sign is found to be unsafe, the Building Inspector shall revoke the sign permit until such time as satisfactory adjustments have been made.

10/15/1974

TAKE NOTICE that a regular meeting of the Town Board held at the Town Hall, Southampton, New York on October 15, 1974 Zoning Ordinance No. 26 was amended as follows:

1. Section 7-50 is hereby amended to read as follows:

7-50 PENALTY FOR VIOLATION

7-50-10 Where a violation of this Ordinance has been committed or shall exist, the owner and the agent or contractor of the building, structure or lot where such violation has been committed or shall exist, the lessee or tenant of

the part of or of the entire building, structure, or lot where such violation has been committed or shall exist, and the agent, architect, contractor or any other person who takes part or assists in such violation, or who maintains any building, structure or lot in which any such violation shall exist, shall be guilty of a violation of this Ordinance.

7-50-20 Persons found guilty of such violation shall be subject to a fine not exceeding fifty dollars ($50.00) or to imprisonment for not more than (6) six months, or both, for each and every violation. Each week's continued violation shall constitute a separate additional violation.

7-50-30 In addition to other remedies provided by law, any appropriate action or proceeding whether by legal process or otherwise, may be instituted or taken to prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, moving, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of such building, structure or lot, or to prevent any illegal act, conduct, business or use in or about such premises.

2. Section 3-50-70.08 is hereby amended to read as follows:

3-50-70.08 Any sign requiring a sign permit which does not have such a permit, or which does not have a sign permit number displayed on its face, or which has had its permit revoked, shall be deemed to be an illegal sign under the provisions of this ordinance. The Building Inspector shall cause a notice of such violation to be served on the owner of the building, structure or lot where said sign is located, or the lessee or tenant of the part of or of the entire building, structure or lot where said sign is located, requiring such owner or lessee or tenant to remove such illegal sign within (7) seven days. Such notice may be served personally or by certified mail, return receipt requested. Upon failure of such owner or lessee or tenant to remove said sign with (7) seven days of receipt of the notice herein provided the

Building Inspector shall be authorized to enter upon such property and remove therefrom any such illegal sign. No liability shall attach to the Town of Southampton nor to any officers, employees, or agents of the Town of Southampton except acts of affirmative negligence in connection with the removal of any such illegal sign. Notwithstanding the foregoing provisions for notice of such violation, the provisions of Section 7-50 of this Ordinance shall be applicable to such violation at all times, including the time prior to the giving of said notice and during said seven (7) day period and persons found guilty of such violation shall be subject to fine and/or imprisonment as set forth in Section 7-50.

Adopted October 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1670

SUFFOLK OUTDOOR ADVERTISING COMPANY,

Appellant,

v.

THEODORE O. HULSE, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

RICHARD E. DePETRIS
EMIL F. DePETRIS
220 Roanoke Avenue
Post Office Box 599
Riverhead, New York 11901
(516) 727-5100

Attorneys for Appellees

June 1978

(7264)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

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TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-1670

SUFFOLK OUTDOOR ADVERTISING COMPANY,
Appellant,

v.

THEODORE O. HULSE, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, appellees move the Court to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question.

STATEMENT

This is an appeal from a judgment of the Court of Appeals of the State of New York, which sustained the constitutionality of the provisions of the zoning ordinance of the Town of Southampton relating to billboards, against a constitutional challenge on the face thereof. The facts underlying the appeal are as hereinafter set forth.

The pertinent sign regulations of the subject zoning ordinance (A163-A168; references preceded by "A" are to the Appendix in the court below) were adopted and became effective in May of 1972. Section 3-50-60.07 prohibits billboards in all districts, except that the Town may establish special

public information centers wherein approved directional signs for businesses may be located (A165). Billboards are defined in Section 1-30-20.68, and in essence consist of off-premises or non-accessory signs (A163). Section 3-50-60.03 prohibits flashing and moving signs in all districts, except time and temperature information (A165). Section 3-110-70.03 declares that non-conforming billboards and flashing and moving signs shall become unlawful structures on June 1, 1975, and shall thereupon be removed (A166). Section 3-110-70.04 provides as follows (A166):

> "Any owner of any such nonconforming billboard or flashing or moving sign, except as provided in Section 3-50-60.03, who alleges that the period herein provided for amortization of such sign is unreasonable as to a particular sign may apply to the Town

Board for an extension of time for amortization of such sign. If the Town Board finds that the construction cost of a particular sign would not be reasonably amortized by the aforesaid date, then the Town Board may extend the amortization period to a date which it finds would provide a reasonable amortization period. In no event however, shall the total amortization period for a particular job extend beyond a date which would result in amortization of the construction cost of a particular sign at a rate of less than $100.00 per year, computed on a "straight line" basis."

Appellant is the owner of billboards situate at various locations in the Town (A36-A37). Appellant challenged the constitutionality of the subject ordinance provisions on their face and as applied to appellant's existing billboards (A107-A117). Appellees moved for judgment dismissing each and every cause of action (A60-A61, A72-A75), and the issues in this case were determined

by the courts below in the procedural context of appellees' motion. The Court of Appeals of the State of New York declared that the subject ordinance provisions are constitutional on their face; the Court dismissed the claim that such provisions are unconstitutional as applied to appellant's existing billboards, because appellant has not exhausted the administrative remedy available under the ordinance (Suffolk Outdoor Advertising Co. v. Hulse, 43 NY2d 483).

At the outset, it should be noted that the free speech and due process issues raised in appellant's jurisdictional statement are somewhat inaccurately characterized in appellant's description of the "Questions Presented". The free speech issue does not involve

expulsion of an entire medium of mass communication (outdoor advertising signs) - the ordinance does prohibit off-premises or non-accessory outdoor advertising signs, but the ordinance permits on-premises or accessory outdoor advertising signs. Furthermore, the description of the justification as a "perception" that the medium offends aesthetic values ignores the inherent nature of billboards - as the court below correctly noted, it cannot be seriously argued that the subject prohibition is not reasonably related to improving the aesthetics of the community. The due process issue does not involve a "concession" that continuance of appellant's billboards will not adversely affect the public welfare - since

aesthetics constitutes a public welfare justification for exercise of the police power, it must be conceded that continuance of appellant's billboards will adversely affect the public welfare. Moreover, appellant's description of the due process issue ignores the fact that the ordinance provides for a reasonable amortization period before removal of the billboards is required.

The Town of Southampton is a rural town located in Suffolk County, Long Island, New York, and it is located in the easterly part of Long Island. There are five incorporated villages (the villages of Westhampton Beach, Quogue, Southampton, Sag Harbor and North Haven) situate within the Town of Southampton, each of which have their own governing

bodies and ordinances, including zoning ordinances. The subject zoning ordinance is effective and operative only in that portion of the Town outside of the incorporated villages.[1]

The Town of Southampton contains unique physical characteristics upon which its significant resort economy, shellfish industry and agricultural economy are based. These unique physical characteristics include the Atlantic Ocean and barrier beach, which provide a lengthy shoreline of magnificent ocean beach, the streams, estuaries and bays, the large areas of open farmlands with good

[1]The population and other figures set forth in appellant's jurisdictional statement include the portions of the Town situate within the incorporated villages.

agricultural soils, and the ridge of the Ronkonkoma Moraine with its large areas of wooded land and panoramic views.[2]

Most of the land area in the Town of Southampton is zoned for residential land use.[3] In this connection, it should be noted that appellant's statement that each of its signs is located on or adjacent to a major commercial thoroughfare is simply not true. The Town has rejected the concept of continuous "strip commercial" development along the highways, and thus it has

[2]Town of Southampton Master Plan (1970) at p. 1-5.

[3]Town of Southampton Master Plan (1970) at p. 35-48; Building Zone Map For The Town Of Southampton (1972).

zoned a substantial portion of the land area along the highways for residential land use, business land uses being concentrated in various locations at appropriate intervals. As a result, many of appellant's signs are located in residence districts.[4]

Appellant's statement that the Town's planners expect its population to reach 250,000 by the end of the next decade is also erroneous and/or misleading. The Town's planners have recommended that the ultimate population potential for the portion of the Town outside of the incorporated villages be limited to

[4] Town of Southampton Master Plan (1970) at p. 43-47 and Future Land Use Map at the end thereof; Building Zone Map For The Town Of Southampton (1972).

91,500 persons on a year around basis.[5]

ARGUMENT

I. THE FREE SPEECH ISSUE RAISED IN APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court below held that the zoning ordinance provisions relating to billboards do not violate freedom of speech. Appellees contend that the free speech issue in this case does not present a substantial federal question, and appellees' contention is fully supported by Markham Advertising Co. v. State of Washington (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316, reh. den. 393 U.S. 1112).

[5] Town of Southampton Master Plan (1970) at p. 29 and 55.

Markham Advertising Co. v. State of Washington (supra) involved a state statute which prohibited billboards[6] and which required removal of pre-existing billboards after a specified period of time (4 years for billboards located in commercial or industrial zones, and 3 years for other billboards). The Supreme Court of Washington rejected the contention that the statute violated freedom of speech, and this Court dismissed the appeal for want of a substantial federal question.

Appellant seeks to overcome Markham by characterizing it as "seemingly outdated" and by stating that the only

[6]The definition of billboards in the case at bar is essentially the same as the prohibition in Markham, with some insignificant differences.

First Amendment authority for the judgment of the Supreme Court of Washington was Valentine v. Chrestensen (316 U.S. 52). In other words, appellant suggests that Markham was based solely on the outdated notion that commercial speech is not entitled to First Amendment protection. However, appellant's suggestion is erroneous, and appellant's attempt to overcome Markham is of no avail.

The Supreme Court of Washington did not decide Markham solely on the authority of Chrestensen. In Markham the Supreme Court of Washington held that the public's right to enjoy highways free of the dangerous, obtrusive and unsolicited presence of advertising structures outweighed the minimal free speech interest at stake. In its

decision, the court considered among other things the intrusive quality of highway outdoor advertising, the scenic beauty of the state, the hazard to traffic safety, and the purely commercial nature of the speech at stake. In addition to citing Chrestensen, the court cited Packer Corp. v. Utah (285 U.S. 105) as support for the nature of billboards and Kovacs v. Cooper (336 U.S. 77) as support for its conclusion on the free speech issue. Kovacs v. Cooper (supra) has frequently been cited by this Court for the proposition that reasonable time, place and manner restrictions applicable to speech are constitutional. Thus it seems abundantly clear that Markham was decided on the basis that the state statute

constituted a reasonable place and manner restriction under the very same First Amendment test which is applicable to the case at bar.

After attempting to overcome Markham, appellant asserts that the subject ordinance provisions are unconstitutional under more recent free speech precedents of this Court. In the first place, appellant's assertion is based upon the erroneous premise that the subject ordinance totally prohibits outdoor advertising signs. The subject ordinance does prohibit billboards, which in essence consist of off-premises or non-accessory signs, in all districts (except that the Town may establish special public information centers wherein approved directional signs for businesses may be

located). However, the ordinance permits on-premises or accessory signs (subject to reasonable regulations). Thus the ordinance does not totally prohibit outdoor advertising signs - it regulates the same as to place and circumstances by prohibiting off-premises or non-accessory signs (billboards) and permitting on-premises or accessory signs.[7] The court below recognized this in pointing out that the ordinance does permit an operative means of advertising and in holding that the subject ordinance constitutes a place and manner restriction.

[7] The mere fact that the outdoor advertising signs involved in the case at bar constitute billboards does not convert the subject ordinance into a total prohibition of outdoor advertising signs.

Once it is recognized that the subject ordinance constitutes a place and manner restriction, it becomes clear that the free speech issue is not substantial. The free speech issue focuses on whether the ordinance serves an interest related or unrelated to the suppression of free speech, whether the impact on speech is significant or incidental, and whether such impact is justified by the interest served (see Linmark Assoc. Inc. v. Township of Willingboro, 431 U.S. 85; Young v. American Mini Theatres, Inc., 427 U.S. 50). The principal purpose of the subject ordinance is to promote aesthetics and preserve community appearance. Therefore, it is abundantly clear that the subject ordinance serves an interest unrelated to

the suppression of free speech. The subject ordinance does not single out speech of a particular content and prohibit dissemination thereof in any manner whatsoever (cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748) or even in a particular manner (cf. Linmark Assoc. Inc. v. Township of Willingboro, supra). Indeed, in pointing out that the ordinance involved in Linmark served an interest related to suppression of free speech[8], this Court expressly indicated that aesthetic values are unrelated to the suppression of free speech (see

[8]The ordinance prohibited "For Sale" signs and the purpose was to suppress communication of the fact that a home was for sale. The municipality feared that potential recipients of the message would act upon it.

431 U.S. 85, 97 S.Ct. at p. 1619). As the court below correctly held, the subject ordinance makes no attempt to regulate the content of the commercial speech appearing on outdoor advertising signs but rather regulates only the place and manner in which outdoor advertising signs may be maintained.

Furthermore, the interest served by the subject ordinance - preservation of community appearance and character - is a legitimate governmental interest which constitutes the essence of zoning. This Court recognized this zoning interest as an important or substantial governmental interest in Young v. American Mini Theatres, Inc. (supra, 96 S.Ct. at p. 2448 & 2452-2453; see also the concurring opinion of Mr. Justice Powell, 96

S.Ct. at p. 2453-2454, 2455 & 2457). Moreover, the impact of the subject ordinance on speech is clearly limited and incidental. It is only off-premises or non-accessory signs which are prohibited; on-premises or accessory signs are permitted. In addition to on-premises or accessory advertising signs, other ample alternative channels for communication are left open - such as newspaper, radio and television advertising, or even handbills or leaflets.

In view of the foregoing, it is clear that the subject ordinance does not violate freedom of speech under the recent free speech precedents of this Court. In this connection, it must be kept in mind that the minimal free speech interest at stake (see Cromwell v.

Ferrier, 19 NY2d 263, 271-272 [outdoor advertising has become a less and less important facet of the advertising business]) is dependant upon erection of permanent structures - the outdoor advertising structures upon which the message appears (see Kovacs v. Cooper, 336 U.S. 77 [free speech interest dependant upon mechanical voice amplification]). The very existence of these unsightly, intrusive structures (see Packer Corp. v. Utah, 285 U.S. 105, 110) is directly related to the principal purpose of the subject ordinance (aesthetics), and the subject prohibition clearly promotes the purpose of preserving the natural beauty and community appearance of the rural Town of Southampton. Thus the governmental interest served by the subject

ordinance clearly outweighs the limited impact on speech (see Kovacs v. Cooper, supra; Markham Advertising Co. v. State of Washington, supra).

In conclusion, it is respectfully submitted that there is nothing in the recent free speech precedents of this Court (subsequent to Markham) which indicates that the free speech issue involved in the case at bar has become a substantial federal question. Indeed, in discussing the First Amendment and recent commercial speech precedents, this Court recently stated that a "state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere" (Young v. American Mini Theatres, Inc., supra, 96 S.Ct. at p. 2451), citing Markham

Advertising Co. v. State (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316).

Appellant's reliance on Linmark Assoc. Inc. v. Township of Willingboro (supra) is misplaced. Linmark involved prohibition of speech of a particular content by a particularly appropriate channel of communication ("for sale" signs in front of the house to be sold), whereas the subject ordinance does not single out speech of a particular content and does permit on-premises or accessory signs. Appellant's reliance on Erznoznik v. City of Jacksonville (422 U.S. 205) is also misplaced, because Erznoznik involved an ordinance which singled out speech of a particular content. In

Erznoznik, this Court expressly pointed out that cases involving place and manner restrictions are decided on different standards than cases involving restrictions directed at content (see 422 U.S. at p. 208-209, citing Kovacs v. Cooper and other cases). Appellant's reliance on Baldwin v. Redwood City (540 F.2d 1360, cert. den. 431 U.S. 913) is also misplaced, because Baldwin involved "political" speech (the First Amendment interest with respect to "political" speech is substantial) and temporary signs, whereas the case at bar involves "commercial" speech (which constitutes a different class - see, eg., Young v. American Mini Theatres, Inc., supra [especially 96 S.Ct. at p. 2451, ftn 32]) and permanent outdoor

advertising structures.

II. THE DUE PROCESS ISSUE RAISED IN APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court below held that the zoning ordinance provisions relating to billboards are constitutional on their face, in that they constitute a valid exercise of the police power. The court below further held that appellant could not attack the constitutionality of the subject ordinance as applied to appellant's existing billboards without exhausting the administrative remedy available under the ordinance, and thus the court below affirmed dismissal of appellant's unconstitutional "as applied" claim for failure to exhaust the administrative remedy. Appellant contends that the due

process issue raised in its jurisdictional statement presents a substantial federal question.

In order to understand the nature of the due process issue raised by appellant, it is necessary to analyze and distinguish the "prohibitory" provision and the "removal" provision of the subject ordinance. The "prohibitory" provision (Section 3-50-60.07) prohibits billboards in all districts. The effect of such provision is that no <u>new</u> billboards may be erected. With respect to appellant's existing billboards, such provision simply renders them nonconforming (which would mean that they could continue to be maintained were it not for the "removal" provision). The "removal" provision (Sections 3-110-70.03

& 3-110-70.04) requires removal of existing billboards after a period of time (a so-called amortization period). The "removal" provision provides a minimum amortization period of about three years (Section 3-110-70.03) and provides an administrative remedy authorizing the Town Board (upon application of a billboard owner) to extend the amortization period if the minimum amortization period is unreasonable as applied to a particular billboard (Section 3-110-70.04). The administrative remedy would result in a determination as to a reasonable amortization period.

The due process issue raised by appellant in its jurisdictional statement is whether a municipal ordinance requiring removal of appellant's property without

compensation deprives appellant of property without due process of law. Insofar as the case at bar is concerned, the only question presented by such issue is whether amortization of nonconforming uses or structures (to wit, termination of nonconforming uses or structures after a period of time without compensation) is per se unconstitutional.

Stated another way, the only question presented is whether it is per se unconstitutional for a municipality to require elimination of nonconforming uses or structures through the exercise of the police power by the amortization method, as distinguished from the exercise of the power of eminent domain. Such question constitutes a constitutional question "on the face" of the

ordinance.[9] The court below held that a municipality can constitutionally invoke the police power amortization method of eliminating nonconforming uses or structures - the court below sustained the constitutionality of the concept of amortization (Suffolk Outdoor Advertising Co. v. Hulse, 43 NY2d 483; Modjeska Sign Studios, Inc. v. Berle, 43 NY2d 468).

Appellees contend that the limited due process issue raised by appellant does not present a substantial federal

[9] There is no issue before this Court as to the constitutionality or reasonableness of the amortization period applicable to appellant's existing billboards, which issue would constitute an "as applied" constitutional question. The court below did not determine the "as applied" constitutional question, but rather held that such question is premature, because appellant has not exhausted the administrative remedy.

question. Stated another way, appellees contend that there is no substantial federal question with respect to the constitutionality of the concept of amortization. Appellees' contention is fully supported by Markham Advertising Co. v. State of Washington (73 Wash.2d 405, 439 P.2d 248, app. dismissed for want of a substantial federal question 393 U.S. 316, reh. den. 393 U.S. 1112) and by other cases involving the constitutionality of the amortization method of eliminating nonconforming uses or structures (see 1 Anderson, American Law Of Zoning [2nd Ed.], §6.67 [especially the cases cited at p. 509-510, ftn 25]; see also Art Neon Co. v. City and County of Denver, 488 F.2d 118, cert. den. 417 U.S. 932).

In Markham Advertising Co. v. State of Washington (supra) the Supreme Court of Washington sustained the constitutionality of a state statute which utilized the amortization concept in order to eliminate existing outdoor advertising signs, and this Court dismissed the appeal for want of a substantial federal question. In Art Neon Co. v. City and County of Denver (supra), the Tenth Circuit Court of Appeals sustained the constitutionality of the amortization concept utilized to eliminate existing outdoor advertising signs, and this Court denied the petition for writ of certiorari. Therefore, it is respectfully submitted that the due process issue raised by appellant does not present a substantial federal question.

CONCLUSION

For the foregoing reasons, appellees move that this appeal be dismissed.

June 1978

Respectfully submitted,

RICHARD E. DePETRIS
EMIL F. DePETRIS
220 Roanoke Avenue
P. O. Box 599
Riverhead, New York 11901
Attorneys for Appellees

No. 77-1670

IN THE

Supreme Court of the United States

October Term, 1978

SUFFOLK OUTDOOR ADVERTISING COMPANY,
Appellant,

v.

THEODORE O. HULSE, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS

WILLIAM H. ALLEN
MICHAEL A. SCHLANGER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CARL W. PETERSON, JR.
Hancock, Estabrook, Ryan,
Shove & Hust
One Mony Plaza
Syracuse, New York 13202

Attorneys for Appellant

July 1978

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The motion to dismiss does not succeed in negating the substantiality of the questions whether, consistent with First, Fifth and Fourteenth Amendments, a local government can expel from every inch of land over which it has legislative power the oldest and least expensive of our media of communication and can do so without compensating the proprietor. We respond briefly to the motion below.

I. THE FIRST AMENDMENT QUESTION

The Town of Southampton has adopted an ordinance that would expel from the Town all off-premises outdoor advertising structures; the defense of the ordinance against

appellant's First Amendment challenge is that it is a mere "place and manner restriction" on speech whose validity is sustained by a decision of this Court. (Motion 15.) The defense fails because (1) the ordinance effects a total prohibition of a medium of communication, not a mere restriction of some uses of the medium, (2) the question whether such a prohibition is valid is at least an open one in this Court and is not concluded by the decision on which the Town relies, and (3) regarded as a "time, place or manner restriction," the ordinance does not satisfy the standards for such restrictions laid down in *Virginia Pharmacy Bd.* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

A

The Town says that the appellant Suffolk Outdoor is wrong when it speaks of the ordinance prohibiting the use of an entire medium of communication in Southampton or expelling a medium of communication from Southampton, because on-premises or accessory signs are permitted. (Motion 5-6, 15-16.) An on-premise or accessory sign directs attention to goods or services sold or offered on the "same lot" as the sign. We noted the exception in our jurisdictional statement (Jur. St. 3 n.2), and we find no occasion for qualifying the way we characterized the breadth of the ordinance there. The familiar standardized outdoor advertising structures or billboards are quite different from signs that announce a tradesman's presence. The functions of the two kinds of signs overlap, but they are not the same. The off-premise billboard is fairly regarded as a separate medium of communication. The Southampton Town Board obviously did not believe that, in drawing the ordinance as it did, it was arbitrarily discriminating in favor of some signs and against others. To the contrary, it thought that it

was dealing with two different kinds of signs that it could reasonably treat differently.[1]

B

In a very recent billboard decision the United States District Court for the District of Maine said that "the Supreme Court has never ruled on the constitutionality of comprehensive anti-billboard legislation . . . ." *John Donnelly & Sons v. Mallar*, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 8. In a footnote to that

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[1]The Town also intimates (Motion 8) that its ordinance has less of a geographical sweep than we have accorded it by suggesting that standardized outdoor advertising structures are not prohibited in the five incorporated villages that comprise .9% (10,270 acres) of the Town's total area. *See* Surveys and Analyses Report, Part 1, Southampton Community at 2-3 (1970); Town of Southampton, Master Plan Report 37. The intimation is not true, even aside from the de minimis size of the incorporated villages. First, although the Town's legislators may have intended to expel signs only from the unincorporated portions of the Town, the pertinent provisions of the ordinance read in Town-wide terms. See Ordinance § 3-50-60.07 ("Billboards are prohibited in all Districts"); § 3-110-70.03 ("Anything to the contrary in this Ordinance notwithstanding, any nonconforming billboard, . . . wherever located, shall . . . be removed"). (Jur. St. 3.) All three of the courts below characterized the ordinance's application as Town-wide. (See Jur. St. 2a, 9a, 10a, 12a, 43a.) Second, it is not clear on the record whether and, if so, to what extent the Town retained zoning power as against the villages. *See* Century Fed. Sav. & Loan Ass'n v. Village of Atlantic Beach, 86 Misc.2d 863, 383 N.Y.S.2d 524 (Sup. Ct., Spec. T., Nassau Co. 1976). Third, even if the Town ordinance does not mean what it says, each of the incorporated villages has a zoning ordinance of its own that effects a village-wide expulsion of all standardized off-premises outdoor advertising signs. *See* Village of Southampton Zoning Ordinance, §§ 1-30-20.64, 3-50-60.07, 3-110-70.03-04 (1973); Zoning Ordinance for the Village of Westhampton Beach, Inc., Art. IX, Section 3.B.2(a) (1977); Zoning Ordinance (Ordinance No. 26) of the Village of Quogue, § 6(w)(3) (1954); Zoning Ordinance of the Village of Northaven, Art. V, § 5.2.2.a, Art. VII, § 7.1.5 (1973); Zoning Ordinance, Code of the Village of Sag Harbor, § 55-27 (1973).

statement the court quoted this Court's statement in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 n.7 (1977), that it was not deciding in that case "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Id.*, slip op. at 8 n.6.

The Maine district court sustained against a First Amendment challenge a Maine statute eliminating most billboards from along the public roads of the state. We believe that decision is wrong for many of the reasons set forth in the jurisdictional statement and this brief. But the significant point is that the Maine court did not regard the First Amendment question as other than substantial, *i.e.*, as "so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration." *Alton R.R. v. Illinois Commerce Comm'n*, 305 U.S. 548, 550 (1939).

The Maine district court was aware of the case whose mere citation Southampton erroneously contends allows one to put aside the First Amendment question here without further consideration. The case is *Markham Adv. Co. v. Washington*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969). The court itself cited *Markham*, slip op. at 8, and of course *Markham* was cited with a "cf." in the quoted passage from *Linmark*, in which this Court apparently regarded the question not as foreclosed but as open.

In *Markham*, a state statute required the removal of most billboards within 660 feet of interstate highways and other designated highways. It had the effect of requiring the relocation of approximately 6 percent of the plaintiffs' billboards in the state. 73 Wash.2d at 414, 439 P.2d at 254. Excepted from the statute's 660-foot setback restriction were some signs advertising activities conducted within 12

miles of the signs.[2] 73 Wash.2d at 410, 417, 439 P.2d at 252, 256.

The state court's consideration of the First Amendment question posed by this statute was brief, barely more than a column. 73 Wash.2d at 428-29, 439 P.2d at 262-63. The only First Amendment decision of this Court cited in support of its holding that the statute did not abridge freedom of speech was *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In the same two-paragraph section of its opinion, the state court cited one other First Amendment decision of this Court, *Kovacs v. Cooper*, 336 U.S. 77 (1949), and that only for its admonition that "to enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."[3] Also cited was *Packer Corp. v. Utah*, 285

[2]It was presumably this aspect of the statute and the *Markham* decision that Mr. Justice Stevens had in mind when, in cataloging permissible restrictions on speech, he cited *Markham* for the proposition that "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere . . . ." Young v. American Mini Theatres, Inc., 427 U.S. 50, 68 (1976). The statement is attributed by the Town to "the Court" (Motion 22), but it is in a part of the prevailing *Young* opinion in which only three other Justices joined. It would not in any event control this case, and we submit that it cannot properly be read as forecasting the answer to the question that, next term, all participating members of the Court in Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94 n.7 (1977), indicated was open.

[3]The Town leans heavily on *Kovacs* as direct and independent support for the proposition that, under the rubric of "place and manner restrictions," government may ban a medium of mass communication from an entire municipality. (*See* Motion 14, 21, 22, 24.) *Kovacs* and the body of caselaw of which it is a central part flatly refute that very proposition. As the Court has often explained, all that was at issue in *Kovacs* was a *limitation* on the use of sound trucks. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976); Buckley v. Valeo, 424 U.S. 1, 18 n.17 (1975) ("the decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use"); California v. LaRue, 409 U.S. 109, 117 n.4 (1972) (characterizing the *Kovacs* ordinance as "forbidding sound

U.S. 105 (1932), which sustained against equal protection and commerce clause claims a state statute that prohibited cigarette and other tobacco product advertising on "any bill board, streetcar sign, placard, or any other object or place of display," but that permitted such advertising "in any newspaper, magazine or periodical. . . ."

The state court summed up its First Amendment holding thus:

> "This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment." 73 Wash.2d at 429, 439 P.2d at 262-63.

In the present case, there is no issue of traffic safety; in the three courts below and in this Court, the Town has stated that the sole purpose of the ordinance is to promote "aesthetics," and the courts below upheld the ordinance on that ground alone.[4] We discuss "intrusiveness" below (pp.

trucks in residential neighborhoods"); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969). Indeed, in the term prior to the *Kovacs* decision, the Court struck down a city ordinance that forbade the use of sound amplification devices without the prior permission of the city's police chief. Saia v. New York, 334 U.S. 558 (1948). In so holding, the Court noted that "the statute is not narrowly drawn to regulate the hours or places of use of loudspeakers, or the volume of sound (the decibels) to which they must be adjusted." 334 U.S. at 560.

[4]Traffic safety is probably not even a rational basis for anti-billboard legislation. *See* "Analysis and Modeling of Relationships Between Accidents and the Geometric and Traffic Characteristics of the Interstate System," Office of Research and Development, Traffic Systems Division, Bureau of Public Roads, Federal Highway Administration, U.S. Dep't of Transportation (1969). The report published the results of a study of more than 40,000 accidents that occurred over a seven-year period in 20 states covering over 8,000 miles of interstate highway.

11-12, *infra*); it is enough to say at this point that, after *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the label has lost its ability to justify restrictions on public speech. So, with the demise of the supposed rule of *Valentine v. Chrestensen* excluding speech of a "purely commercial nature" from First Amendment protection, *Markham* has no underpinning pertinent to this case. On its facts and on the law it purported to express, *Markham* does not control this case.

C

The Southampton ordinance cannot successfully be defended as a "time, place or manner" restriction of speech because it does not satisfy the three standards set forth by this Court in *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). That is, the Town has not justified its ordinance "without reference to the content of the regulated speech," and it has not shown that its billboard prohibition serves "a significant governmental interest" or that it leaves "open ample alternative channels for the communication of the information." In its jurisdictional statement, Suffolk Outdoor took up these standards in reverse order of their articulation by the Court in demonstrating that they are not satisfied by the Southampton ordinance. We follow that order again in addressing the Town's effort in its motion to show the contrary.

1. **Alternative Channels.** Against the hard facts recited in the jurisdictional statement concerning the unique efficiency and economy of outdoor advertising as a medium of communication (Jur. St. 4-7, 14-16, 22-23), the Town

Among conclusions was that there was no adverse relationship between accidents and advertising signs and that the presence of advertising signs seemed indeed to be associated with a decrease in the number of accidents. *Id.* at 20.

pits these three pronouncements: (a) The ordinance permits "on-premises or accessory signs" and these are "ample alternative channels for communication" (Motion 20); (b) "other ample alternative channels are left open — such as newspaper, radio and television advertising, or even handbills or leaflets" (*id.*); and (c) "outdoor advertising has become a less and less important facet of the advertising business" (*id.* at 21). The first of these pronouncements is unresponsive, and the latter two are demonstrably incorrect.

As noted above, the prohibition of the ordinance does not extend to signs that direct attention to goods or services sold or offered on the "same lot" as the sign. This dispensation for on-premises signs is a blessing to those of Southampton's businesses located on major commercial thoroughfares. But it leaves no "alternative," "ample" or otherwise, for Southampton's businesses located on side streets, above street level or below ground, and thus without a parking lot or a brick wall to permit posting of their advertising signs. And, of course, the freedom to post a sign that makes known the presence and nature of one's business offers nothing for many non-commercial advertisers, *e.g.*, the candidate for Town or village supervisor or board member, the proponent of a fund drive or the advocate of family planning,[5] to say nothing of the national or regional commercial advertiser whose business is not transacted on any particular Southampton "lot."

The inaccessibility to many advertisers of modest means of radio and television and the daily newspapers is documented at pages 14-16 of the jurisdictional statement. To claim that, for a local political candidate, a $6,000 30-

[5]*Cf.* Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972) (holding violative of the First Amendment a city ordinance that prohibited billboard advertising of abortion information).

second television spot on a New York City station is an "ample alternative" to one or more inexpensive local signboards is to rob that phrase of the meaning given to it by this Court in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). (*See* Jur. St. 13-14.) "Handbills or leaflets" surely are not "ample alternative channels for communication" of political, civic or commercial information to the persons who live or regularly transact business in the 171 square miles of what the motion itself refers to as a "rural town." (Motion 7.)[6]

Finally, if the outdoor advertising industry's percentage share of gross national advertising revenues has dipped a fraction of a percentage point, that is only because outdoor advertising, which "uses little energy and creates no waste,"[7] has kept tight rein on its cost to advertisers, while the other mass media have steadily increased their prices.[8] The demand for sign space has never been greater: On the national level, in 1977 outdoor advertising revenues totalled $461,757,084, *see Outdoor Advertising Expenditures*, in-

[6]The "rural town" description fairly suggests the problems a handbiller or leafleteer would have in finding large concentrated groups of Southampton residents or business visitors. On the other hand, if it suggests placid rusticity, it paints a distorted picture of the Town as it now is and will develop. The Town is correct in noting that once it wished it would see a limitation on part of its population growth (*i.e.*, year-round residents outside the incorporated villages). (Motion 10-11.) The repeated expression of the wish does not, however, render "erroneous or misleading" our statement of fact, taken number-for-number from the Town's Master Plan at 20, that the Town projected that "by 1990 Southampton's year-round and 'seasonal' (summer and weekend) populations would reach 84,000 and 175,100, respectively" (Jur. St. 6).

[7]"The Low-Priced Spread," Forbes, Jan. 15, 1977, at 64 ("With other advertising rates rising rapidly, billboards are starting a comeback by being the cheapest game in town").

[8]*Id.*; "For Billboards, the Signs are Bullish," The New York Times, June 25, 1978, § 3, p. F3, col. 1.

side cover page (Leading National Advertisers, Inc. 1978); prior five-year comparisons had shown that outdoor advertising industry revenues rose 41.4 percent between 1970 and 1975 and 8.3 percent between 1974 and 1975 alone. *Ayer Media Facts* 2 (1976-77). We are not dealing here with a dying medium, to which alternatives have proved more attractive.[9]

2. **Significant Government Interest.** In the courts below and in its present motion to dismiss, the Town has presented as justification for its ordinance two catch-phrases taken from inapposite decisions, "captive audience" and "unsightly intrusion," and the vague, unspecific interest in aesthetics attributed to it by the Court of Appeals. (Motion 6-7, 17, 19, 21.) To attempt to sustain an ordinance on such bases is to ignore a lesson that this Court has had to remind us of again and again: Rights protected by the First Amendment "may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court." *In re Primus*, No. 77-56, decided May 30, 1978, slip op. at 20 n.27 (1978); *see also First Nat'l Bank v. Bellotti*, No. 76-1172, decided April 26, 1978, slip op. at 22-23; *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576,581 (1971); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *NAACP v. Button*, 371

[9]The misleading decline in the percentage of total dollar advertising outlays that are accounted for by billboards was relied on by the court in John Donnelly & Sons v. Mallar, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 13, n.10, in finding that "[t]he overwhelming majority of advertisers thus already avail themselves of alternative modes of communication." Unlike the Southampton ordinance, the Maine statute sustained in *Donnelly* exempts noncommercial communications, and the district court believed — erroneously, we submit — that commercial advertisers would be able adequately to convey their messages through on-premises signs and the official business directional signs and tourist information centers for which the Maine statute specifically provides.

U.S. 415, 442-43 (1963); *Wood v. Georgia*, 370 U.S. 375, 387-88 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536 (1945). It is not enough for government to proclaim its purpose a high-minded one that in the defining words chosen by its lawyer rests neatly beside some prior case deciding some constitutional question.

Absent from the Town's present defense of its ordinance is any evidence from which even an inference could be drawn that there is no room in Southampton for Suffolk's signs, that they are "basically incompatible with the normal activity" of any of the 28 "particular places[s]" they now occupy. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[10] Nor is there any elaboration of the "aesthetic purpose" that will be served by removing standard-sized, well-constructed and well-maintained structures advertising career opportunities in the United States Army and Marine Corps, federal government energy conservation and other programs, and the goods and services offered by businesses located within the Town, from the very streets on which those and other businesses and industrial uses are maintained. If the Town's purpose in enacting and defending the ordinance was, as the Town's appellate counsel now urges, the "preservation of community appearance and character" (Motion 17, 19, 21), the Town would permit the "preservation" of Suffolk's signs in the locations they have occupied since as early as 1934.

The supposed intrusiveness of billboards cannot be made to justify their prohibition. That was made clear in *FCC v.*

[10]Despite general statements concerning its zoning goals (Motion 9-10), the town offers no elucidation of actual land use in Southampton. Suffolk stands behind its assertions that "each of its signs is located on or adjacent to a major commercial thoroughfare linking Southampton with other area communities" (Jur. St. 6-7), and that each such sign is located in a zoning district "occupied also by other commercial establishments" (*id.* at 4). Proof of the assertions rests in Southampton's own Master Plan, Building Zone Map and official records of actual permitted land use along the thoroughfares in question.

Pacifica Foundation, No. 77-528, decided July 3, 1978. In holding that the FCC could impose reasonable restrictions on the time of broadcast of a particular monologue patently offensive to many, the Court reasoned that the broadcast media, coming into "the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder," are unique in their intrusiveness. Slip op. at 20. "Outside the home," the Court said, "the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away." *Id.* n.27, citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and citing and quoting from *Cohen v. California*, 403 U.S. 15, 21 (1971). In his concurring opinion, Mr. Justice Powell, joined by Mr. Justice Blackmun, specifically joined in this part of the prevailing opinion and repeated the thought there expressed. *Id.*, concurring opinion at 5. Dissenting, Mr. Justice Brennan, joined by Mr. Justice Marshall, embraced the doctrine of *Erznoznik* and *Cohen* but thought, contrary to the majority, that the radio listener, with his ability to turn off his set or turn to a different station, stood constitutionally with the person affronted by an unpleasant communication in a public place who is able to turn away. *Id.*, Brennan dissent at 4-5. Thus, there was general agreement among the Justices who expressed themselves that people outside their homes, free always to turn away, are not the "captive audience" that those who seek to repress speech so often profess to protect.

3. **The Regulation of Content.** In trying to distinguish this case from *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977), Southampton affirms that its ordinance is aimed at billboards in part because their messages are perceived to be commercial. It does this when it argues that the *Redwood City* ordinance infringed political speech but its ordinance concerns only commercial speech. (Motion 24.) We have shown in the

jurisdictional statement that Southampton is mistaken in its perception of the relative commercial and non-commercial content of billboard speech as contrasted with other media. In any event, it is too late in the day to justify a billboard prohibition, as the state court did in *Markham*, on the content-related ground of the "purely commercial nature" of outdoor advertising. *See Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

II. THE TAKING QUESTION

The decision below on the taking issue was that just compensation need not be paid by the Town of Southampton to Suffolk for the compelled removal of its billboards. Thus, contrary to Southampton's assertion (Motion 25-26), a decision has been made that the ordinance, which invoked the police power and not the power of eminent domain, may constitutionally be applied to Suffolk. The issue that Suffolk is free to pursue administratively following the final judicial decision dismissing its complaint is a different issue. It is whether a grace period provided by the ordinance for the removal of existing billboards, the so-called amortization period, is "reasonable" according to the Court of Appeals' standard of reasonableness. That court while rejecting the requirement of just compensation held that a billboard owner should be allowed to recover over time a substantial part of his investment. The allowance of a grace period was held by the court not to be the equivalent of just compensation; the Court of Appeals said, moreover, that its standard of "reasonableness" does not require that a billboard owner "be given that period of time necessary to permit him to recoup his investment entirely." (Jur. St. 5a.)

It is quite true (Motion 30-31) that the question of un-

compensated relocations of some billboards, tempered by provision for so-called amortization, was before the Court in the *Markham* case and, on a petition for certiorari, in *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). Neither case involved anything like the complete elimination of all existing billboards from a jurisdiction that this case does. The question whether such a complete elimination is consistent with the Fifth and Fourteenth Amendments has not been considered by this Court.[11] Even the question raised by *Markham* and *Art Neon* of compelled, uncompensated relocation of some billboards, subject to "amortization," has not been the subject of plenary consideration by the Court. For the reasons stated in the jurisdictional statement (which are scarcely addressed in the motion to dismiss) the question posed here should be considered by the Court.

In one of its last opinions of the 1977 Term, the Court reaffirmed that a taking may occur even though, as is true here, physical control over property has not been transferred to the government, *Penn Central Transp. Co. v. New York City*, No. 77-444, decided June 26, 1978, slip op. at 17 n.25; it also said that the question what constitutes a taking "has proved to be a problem of considerable difficulty," for the answer to which the Court "has been unable to develop any 'set formula,'" *id.* at 17; "indeed," the Court noted, "we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case,'" *id.* at 18. We submit that the circumstances here, especially the direct and substantial impact of the ordinance on Suffolk — "the extent to which [it] has interfered with distinct investment backed expectations," *id.* — and the uncertain, attenuated nature of the governmental interest the ordinance is intended to further, call for compensation in "justice and fairness," *id.* at 17. The question at any rate is a substantial one.

[11]The question whether the Maine billboard statute deprives the billboard proprietors of their property without just compensation was reserved by agreement of the parties and therefore not ruled on in the district court's decision of July 11. John Donnelly & Sons v. Mallar, D. Me. Civil No. 77-284-SD, decided July 11, 1978, slip op. at 8 n.7.

CONCLUSION

For the reasons stated in the jurisdictional statement and this brief, probable jurisdiction should be noted and the case set for consideration on the merits.

Respectfully submitted,

WILLIAM H. ALLEN
MICHAEL A. SCHLANGER
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CARL W. PETERSON, JR.
Hancock, Estabrook, Ryan,
Shove & Hust
One Mony Plaza
Syracuse, New York 13202

Attorneys for Appellant

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